SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1968

346

RAY BAILEY, RESPONDENT

versus

ELLIS MACDOUGALL, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS FOR THE STATE OF SOUTH CAROLINA, *et al.*, PETITIONERS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

DANIEL R. McLEOD,
Attorney General,
Columbia, S. C.,

EDWARD B. LATIMER,
Assistant Attorney General,
Columbia, S. C.,
Counsel for Petitioners.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

	Page
Authorities Cited	iii
Citation of Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting Writ	6
Argument:	
Question One (1)	7
Question Two (2)	29
Summary	46
Conclusion	47
Appendix Index	52

AUTHORITIES CITED

Cases:	Page
Anderson v. N. C. 221 F. Supp. 930 (W. D. N. C. 1963)	24
Bailey v. McDougall, 247 S. C. 1, 145 S. E. (2d) 425 (1965)	5, 16, 27, 36
Bailey v. MacDougall, ... F. Supp. ...., decided 23 August, 1967 (D. C. S. C.)	29
Bailey v. MacDougall, 392 F. (2d) 155 (4 Cir.), decided 28 February, 1968	1, 2
Bailey v. MacDougall, ... F. (2d) ...., decided 29 April, 1968	2
Bailey v. S. C., 384 U. S. 962, 86 S. Ct. 1589 (1966)	5
Barbee v. Warden, Maryland Penitentiary, 331 F. (2d) 842 (4 Cir. 1964)	8
Barber v. Gladden, 220 F. Supp. 308 (D. Ore. 1963)	24
Berger v. United States, 295 U. S. 78 (1935)	7
Brady v. Maryland, 373 U. S. 83 (1963)	8
Brown v. Smyth, 271 F. (2d) 227 (4 Cir. 1959)	13
Carroll v. MacDougall, 248 S. C. 141, 149 S. E. (2d) 343 (1966)	14, 42
Commonwealth v. Ashe, 141 Pa. Super. 408, 15 A. (2d) 409	21
Commonwealth v. Battis, 1 Mass. 95	42
Cortez v. U. S., 337 F. (2d) 699 (1964)	26
Dillon v. U. S., 307 F. (2d) 445 (CA9, 1962)	25
Ellis v. Boles, 251 F. Supp. 1021 (D. C. N. D. W. Va. 1966)	12
Evans v. Kropp, 254 F. Supp. 218 (E. D. Mich. 1966)	8
Ex Parte Darling, 120 Nebr. 829, 235 N. W. 582	20
Ex Parte Farrar, 74 Okla. Cr. 390, 126 P. (2d) 547	21

AUTHORITIES CITED—Continued

Cases: PAGE

Fay v. Noia, 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. (2d) 837 ..... 29, 38

Fernandez v. Klinger, 346 F. (2d) 210 (9 Cir. 1965) .. 11

Harris v. U. S., 216 F. (2d) 953 (5 Cir. 1954) 10

Kadwell v. U. S., 315 F. (2d) 667 (CA9, 1963) 25

Kircheval v. U. S., 274 U. S. 220 (1927) 12, 24, 40

Lobaugh v. State, 266 Ind. 548, 82 N. E. (2d) 247 20

Machibroda v. U. S., 368 U. S. 487 (1962) 10, 12, 24

McGrady v. Cunningham (CA4, Va.), 296 F. (2d) 600, 96 A. L. R. (2d) 1286, cer. den., 369 U. S. 855, 8 L. Ed. (2d) 14, 82 S. Ct. 944 16

Mooney v. Holohan, 294 U. S. 103 (1935) 7

Napue v. Illinois, 360 U. S. 264 (1959) 8

Nutt v. U. S., 335 F. (2d) 817 (10 Cir. 1964) 13

People v. Painter, 29 Cal. Reptr. 121 21

People v. Schmidt, 10 Ill. (2d) 221, 139 N. E. (2d) 726 (1957) 25

People v. Sullivan, 276 App. Div. 1087, 96 N. Y. S. (2d) 266 (1950) 21

Plyle v. Kansas, 317 U. S. 213 (1942) 7

Shelton v. U. S., 246 F. (2d) 571 (CA5, 1957) 25

Shelton v. U. S., 242 F. (2d) 101 (5 Cir. 1957) 10

State of S. C. v. Bailey, 289 U. S. 412 (1933) 3

State v. Chasteen, 228 S. C. 88, 88 S. E. (2d) 880 (1955) 14

State v. Miller, 84 A. (2d) 459, 16 N. J. Super. 251; Cert. den., 72 S. Ct. 379, 342 U. S. 934, 96 L. Ed. 695 20

State v. Mouzon, 231 S. C. 655, 99 S. E. (2d) 672 (1957) 14

Thomas v. U. S., 290 F. (2d) 696 (9 Cir. 1961) 11

Cases: PAGE

Thomas v. Warden, Maryland Penitentiary, 236 F. Supp. 499 (1964) 26

Thompson v. State, 248 S. C. 415, 151 S. E. (2d) 221 (1966) 14, 42

Tillman v. State, 244 S. C. 259, 136 S. E. (2d) 300 (1964) 17, 26

U. S. v. Davis, 212 F. (2d) 264 (7 Cir. 1954) 10

U. S. v. Marin, 265 F. (2d) 241 (3 Cir. 1959) 11, 12

U. S. v. Rizzo, 362 F. (2d) 97 (7 Cir. 1966) 10

U S. v. Swaggerty, 218 F. (2d) 875 (7 Cir. 1955) 10

U. S. ex rel. Almeida v. Baldi, 195 F. (2d) 815 (3 rd. Cir. 1952) 7

U. S. ex rel. Montgomery v. Ragen, 86 F. Supp. 382 (N. D. Ill., 1949) 8

U. S. ex rel. Staplers v. Pate, 222 F. Supp. 998 (N. D. Ill., 1963) 25

U. S. ex rel. Thompson v. Dye, 221 F. (2d) 763 (3 Cir. 1955) 7

Vanater v. Boles, Advance sheet No. 10726, dated 24 May 1967 (4 Cir. 1967) 12, 13

Wallace v. Heinz, 351 F. (2d) 39 (9 Cir. 1965) 11

Williams v. Kaiser, 323 U. S. 471 (1945) 25

Encyclopedias and Texts:

16A C. J. S. 643, Constitutional Law, Sec. 588 ..15, 20, 41

16A C. J. S. 644, Constitutional Law, Sec. 588 20

16A C. J. S. 645, Constitutional Law, Sec. 589 21

22 C. J. S. 1176, Crim. Law, Sec. 423 (1) 17

22 C. J. S. 1176-1180, Crim. Law, Sec. 423 (2) 17

AUTHORITIES CITED—Continued

Encyclopedias and Texts: PAGE

22 C. J. S. 1181-1182, Crim. Law, Sec. 423 (3) 18

22 C. J. S. 1183, Crim. Law, Sec. 423 (3) 18

22 C. J. S. 1183-1185, Crim. Law, Sec. 423 (4) 19

22 C. J. S. 1186, Crim. Law, Sec. 423 (4) 19

22 C. J. S. 1188-1190, Crim. Law, Sec. 424 (1) 20

22 C. J. S. 1197-1198, Crim. Law, Sec. 424 (5) 20

39 C. J. S. 442, Habeas Corpus, Sec. 13 21

39 C. J. S. 520, Habeas Corpus, Sec. 29 20

14 Am. Jur. 951, Criminal Law, Section 270 .....15, 41

14 Am. Jur. 953, Crim. Law, Sec. 273 22

113 A. L. R. 814 22

62 A. L. R. (2d) 467 21

97 A. L. R. (2d) 549, 552, 557 .....15, 43

23 La. L. Rev. 783 22

112 Univ. of Pa. L. R. 865 .....23, 24, 25

50 Yale L. J. 107 22

4 Wharton's Criminal Procedure, Section 1900, pp. 767, 768 15

Statutes and Others:

Section 16-52, 1962 S. C. Code of Laws 14, 30

Section 17-553.4, 1962 S. C. Code of Laws 14, 30

Canon 5, American Bar Association, Canons of Professional Ethics 7

Rule 11, Fed. R. Crim. Pro., 18 U. S. C. A. 8, 9, 17 24, 25, 39, 41

Institutes of Judicial Administration, A. B. A., Standards Relating to Pleas of Guilty (1967) 34

Supreme Court of the United States

OCTOBER TERM, 1968

RAY BAILEY, RESPONDENT

versus

ELLIS MACDOUGALL, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS FOR THE STATE OF SOUTH CAROLINA, *et al.*, PETITIONERS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of RAY BAILEY, APPELLANT, *versus* ELLIS MACDOUGALL, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS FOR THE STATE OF SOUTH CAROLINA, *et al.*, APPELLEES. The Fourth Circuit denied a petition by the State of South Carolina for a rehearing of this case *en banc* by order filed on 29 April, 1968.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as RAY BAILEY, APPELLANT, *versus* ELLIS MACDOUGALL, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS FOR THE STATE OF SOUTH CAROLINA, *et al.*, APPELLEES, 392 F. (2d) 155 (4th Cir., 1968) and is printed as Appendix F to this petition. The order of The Fourth Circuit denying the Petition for a Re-Hearing, dated 29 April, 1968, is printed as Appendix G to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on 28 February 1968. (see Appendix F.) On 29 April 1968 the Fourth Circuit entered an order denying a petition for a rehearing of this case *en banc* which had been filed by the State of South Carolina. (See Appendix G).

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254(1).

QUESTIONS PRESENTED

1. Was the guilty plea of the Appellant made voluntarily with understanding of the nature of the charge?

2. Was the opinion of The Fourth Circuit in this matter without basis in law or fact?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides as follows:

> Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT

Respondent, Ray S. Bailey, was indicted August 25, 1932, on a charge of murder in the Greenville County Court of General Sessions and tried in January, 1936, having been extradicted to the State of South Carolina from the State of North Carolina pursuant to the decision of the U. S. Supreme Court in *State of South Carolina v. Ray Bailey,* 289 U. S. 413 (1933). Respondent changed his plea to guilty of murder with recommendation to the mercy of the Court, following the negotiation of an agreement, which was reduced to writing, between the then solicitor, the chief of Police and Respondent's attorney, the agreement being that the solicitor and Chief of Police would recommend a pardon or parole after the Respondent had served a period not exceeding ten years. Neither the fact nor the contents of the agreement was disclosed to the Court. The Respondent was sentenced to be confined for a term of his whole natural life by Judge A. L. Gaston, by order dated 13 January, 1936.

On May 4, 1964, the Respondent, through counsel, filed a petition for a *Writ of Habeas Corpus* in the Court of Common Pleas for Richland County, alleging that his restraint under the above sentence was unlawful and in violation of his constitutional rights under both the State and Federal Constitutions, asserting among other things a denial of due process of law and that his guilty plea was induced by a promise that he would serve only ten years or possibly less of the sentence. The Honorable John Grimball, Judge, Fifth Judicial Circuit, issued the writ of *hebeas corpus,* and hearing were held.

Mr. C. G. Wyche, counsel for Bailey, and Mr. J. G. Leatherwood, the Solicitor of the Thirteenth Judicial Circuit in 1936, offered testimony in the *habeas corpus* proceeding stating that they entered into negotation concerning a possible guilty plea. Mr. Leatherwood and Mr. J. E. Smith, Chief of Police of Greenville in 1936, signed a statement dated 13 January, 1936, which was given to Mr. Wyche. The statement reads to wit:

> "This will confirm our conversation that in the event that Ray Bailey enters a plea of guilty with recommendation to mercy in the case now pending against him in the General Sessions Court for Greenville County, that I will, knowing the facts of the case and the circumstances surrounding same, after the said Ray Bailey has served for a period not exceeding ten years, recommend to the Board of Pardons or Governor a pardon or parole."

Mr. Leatherwood did not confer with Bailey. The statement was explained to Bailey by Mr. Wyche, his attorney.

The Respondent, Ray S. Bailey, alleged in his Petition that the voluntary nature of his guilty plea was destroyed because of the agreement with the Solicitor, which was reduced to writing.

The Solicitor testified that he initiated the negotiations to get the Respondent to plead guilty (Tr., 87) because John Corea, a principal witness for the State, refused to testify unless the President of the U. S. gave him a full pardon for the offense he was then serving in the Federal Penitentiary. (Tr., 86). Another witness, John Singleton, stated that "Ray Bailey" shot him. (Tr., 15, 16, 85). The Solicitor thought, however, that without Corea's testimony the possibility of getting a conviction was extremely remote. (Tr., 93). He further testified that the facts of the deficiency of the State's case were not known to Respondent's attorney, (Tr., 86, 100), during the negotiations for the plea, or to the Court at the time the plea was entered. (Tr., 89). The conviction of Corea was public record. The counsel for Bailey "• • • was satisfied that the State had enough evidence to warrant the Judge in submitting the case to the jury. • • • ." (Tr., 23.)

By Order of July 29, 1964, Judge Grimball set aside the guilty plea and sentence on the grounds that it was induced by the promise with respect to the sentence, and remanded the case to Greenville County for a new trial. The Respondent was released from custody after posting bond. The State appealed to the Supreme Court of South Carolina.

The Supreme Court of South Carolina reversed and remanded, discharging the writ of *habeas corpus* on November 10, 1965, 247 S. C. 1, 145 S. E. (2d) 425 (1965). Petition for rehearing was filed on November 18, 1965, to focus the attention of the Court on the question of nondisclosure by the prosecutor, but rehearing was denied without opinion on December 14, 1965.

Thereafter a Petition for a writ of *certiorari* to the South Carolina Supreme Court was filed on April 14, 1966, in the United States Supreme Court, where *Certiorari* was denied, 384 U. S. 962, 86 S. Ct. 1589.

The Respondent filed a Petition for a writ of *habeas corpus* in the United States District Court for South Carolina, which was denied by order of Judge Robert W. Hemphill on 23 August, 1967. (Appendix, E, pp. 70-78).

The Fourth Circuit reversed and remanded to the District Court, by opinion dated 28 February, 1968. 392 F. (2d) 155 (1968). (Appendix F., pp. 79-87.)

Pursuant to Rule 19 of the Rules of the Fourth Circuit, for the State of South Carolina, respectfully petitioned for a re-hearing *en banc* from a decision of the Court handed down on 28 February, 1968, in the matter. This case was not previously argued before the full Court sitting *en banc.*

It was submitted that in this case the opinion and rule of law stated therein, was of such gravity, that it was believed by Counsel for the Petitioners that the full Court sitting *en banc* should re-hear the case and then render an opinion reflective of the entire Court.

The Fourth Circuit denied the Petition for re-hearing, by order dated 29 April, 1968. (Appendix G, p. 88.)

REASONS FOR GRANTING THE WRIT

(1) The decision of the United States Court of Appeals for the Fourth Circuit in this case is in conflict with decisions by the South Carolina Supreme Court on the question.

(2) The decision of the United States Court of Appeals for the Fourth Circuit in this case is in conflict with decisions rendered by the U. S. Supreme Court on this same question.

ARGUMENT

Question I

Was the guilty plea of the Respondent made voluntarily with understanding of the nature of the charge?

The Court stated in *Berger v. United States,* 295 U. S. 78, 88 (1935), that while the United States Attorney "• • • may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." In the present matter no foul blows were struck and no wrongful conviction was obtained.

Canon Five of the American Bar Association Canons of Professional Ethics states. "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done." Justice was done in the present case. There was no suppression of evidence through intimidation of witnesses by the prosecution.

In the present matter there was no "deliberate deception" of the Court, as stated in *Mooney v. Holohan,* 294 U. S. 103, 113 (1935).

The present matter has no similiarity to the case of *Pyle v. Kansas,* 317 U. S. 213 (1942), where "• • • his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by these same authorities of evidence favorable to him." In the present matter there was no perjured testimony and no evidence was suppressed favorable or unfavorable to the appellant.

The cases of *United States ex rel., Almeda v. Baldi,* 195 F. (2d) 815 (3rd Cir. 1952), cert. den., 345 U. S. 904 (1953), and *United States ex rel., Thompson v. Dye,* 221 F. (2d) 763 (3rd Cir. 1955), reh. den. May 23, 1955, also in-

volved the "suppression of evidence favorable" to the accused. The prosecutor failed to disclose exculpatory evidence in *United States ex rel., Montgomery v. Ragen,* 86 F. Supp. 382 (N. D. Ill., 1949).

Napue v. Illnois, 360 U. S. 264 (1959), involved a conviction obtained through the use of false evidence known to be such by the representatives of the State. In *Brady v. Maryland,* 373 U. S. 83 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution." In the present matter there was no request for any evidence and no evidence was suppressed that could have been used in any trial. *Barbee v. Warden, Maryland Penitentiary,* 331 F. (2d) 842 (4th Cir. 1964), involved police suppression of material information. There was no suppression of any evidence by anyone in the Bailey matter.

Counsel for the Respondent stated in Brief before the Fourth Circuit, that "rule of fundamental fairness in the *Barbee* case has been extended to guilty pleas by the case of *Evans v. Kropp,* 254 F. Supp. 218 (E. D. Mich. 1966). The record shows that the State Solicitor and the defense counsel dealt fairly and correctly with each other. The Respondent's guilty plea was "made voluntarily with the understanding of the nature of the charge." Rule 11, Fed. R. Crim. Pro. was complied with, even though not applicable to the State Court proceeding. In the present matter the State Solicitor was not in possession of material evidence which was not disclosed to the Court. The defense counsel knew, or should have known, that a witness was in the Federal Penitentiary. It was a matter of conjecture as to whether he would be a witness.

In the present matter nothing was offensive to the sense of justice. The conduct of the prosecution in the in-

stant case was commendable. The Respondent's life was spared while the objective of a conviction for the State was achieved. The bargaining for a guilty plea with an agreement, which the prosecution knew would be carried out, was valid. The defense knew the agreement would be carried out because the entire agreement was set out in writing. There was to be no reliance on memory. (Tr., 16, 17.) The record shows that the State Solicitor carried out the agreement. There was no defect in the case of the state. The State knew that there was the possibility that one of the witnesses might refuse to testify, but the state still had enough evidence to obtain a conviction. The Respondent was not denied the protection of competent counsel or an adequate defense by effective counsel. He was not denied the protection of the Court, but instead, was accorded due process of law.

The Respondent was informed of the crime with which he was charged and was informed of the consequences of the conviction thereon. He knew that he would receive a life sentence.

The plea of guilty in this capital case was accepted cautiously and not until after the appellant had been fully advised by the defense counsel of his rights and the consequences of his plea. The court was satisfied that the appellant acted voluntarily and with full knowledge, appreciation and understanding of the nature and consequences of the plea.

Rule 11 of the Federal Rules of Criminal Procedure provides that the court may refuse to accept a plea of guilty, and "shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge." This rule was complied with in the present matter. The defense counsel had many years of legal experience and testified that there was no question concerning the voluntariness of the guilty plea

by the appellant. (Tr., pp. 17, 27, 28.) The Respondent made a valid plea of guilty with the knowledge and appreciation of its consequences.

Counsel for Respondent, in Brief to Fourth Circuit, admitted that ". . . in the Federal Cases that there is no particular form or ritual which must be followed in determining that a guilty plea is made voluntarily. See; *United States v. Rizzo*, 362 F. (2d) 97 (7th Cir. 1966); *Shelton v. United States*, 242 F. (2d) 101 (5th Cir. 1957), rev'd, 356 U. S. 26; *United States v. Swaggerty*, 218 F. (2d) 875 (7th Cir. 1955); *Harris v. United States*, 216 F. (2d) 953 (5th Cir. 1954); *United States v. Davis*, 212 F. (2d) 264 (7th Cir. 1954)."

The State courts are not bound by the Federal Rules, but are bound by the requirements of due process. The record before this Court shows that the Trial Judge had no knowledge of the agreement made between the prosecutor and the counsel for the accused, who in turn presented the agreement to the accused. There was no necessity for the court to admonish the accused concerning the consequences of the plea because the consequences were automatic and were given to the Respondent by his counsel.

There is not now, nor was there at the time of Respondent's trial, any statutory requirement or court rule in South Carolina requiring the accused to be advised by the court as to the nature and consequences of his plea, but the S. C. Courts have always made a determination concerning the voluntariness of the plea.

The voluntary nature of the guilty plea in this case was shown by the fact and content of the written agreement by the Solicitor and the Chief of Police to recommend parole for appellant within ten years. At the time this agreement was made a recommendation to parole by a solicitor to the Governor carried great weight, just as the recommendation to parole by a Solicitor at the present time to

the S. C. Probation, Parole and Pardon Board carries great weight, However, the appellant knew that "• • • this recommendation did not mean that the Governor would have to grant the parole or the pardon, but I did state to him that, ordinarily, the Governor would give great weight to the recommendation • • •." (Tr., 17, 18.)

The Governor of South Carolina had absolute discretion as to the granting of paroles and pardons. When the Respondent was due for consideration under the terms of the agreement the probation and parole system for the State had been changed, placing the parole function in the hands of a Parole Board with discretionary powers. The record indicates that the Respondent knew that the written agreement was not a guarantee of freedom within ten years or less. He knew that there was a possibility that he might get a parole. His counsel stated to the Respondent that "• • • if you were not there and did not participate in the shooting, I would advise you under no circumstances to enter any plea of guilty of any kind • • •." The Respondent conferred with his brother and his counsel and agreed to plead guilty. (Tr., 16, 17.)

The conviction and sentence which follow a plea of guilty are based solely and entirely upon the said plea and not upon any evidence which may have been improperly acquired by the prosecuting authorities. *Wallace v. Heinz*, 351 F. (2d) 39 (9th cir., 1965); quoting *Thomas v. U. S.*, 290 F. (2d) 696-697, (9th Cir. 1961). Also see *Fernandez v. Klinger*, 346 F. (2d) 210 (9th Cir., 1965) and *U. S. v. Marin*, 265 F. (2d) 241 (3rd Cir., 1959). A plea of guilty differs in purpose and effect from a mere admission or an extra judicial confession, it is itself a conviction. Like a verdict of a jury it is conclusive, more is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime courts are careful that a plea of guilty shall not be ac-

cepted unless made voluntarily after proper advice and with full understanding of the consequences. *Machibroda v. U. S.*, 368 U. S. 487, 493 (1962) quoting *Kircheval v. U. S.*, 274 U. S. 220, 223 (1927).

It is clear, therefore, that the question before the Court is the voluntariness of the plea which involves:

(1) Whether the plea was freely and voluntarily made with a knowledge of its consequences, and

(2) Whether the actions of appellant's defense counsel in the original criminal prosecution amounted to incompetent counsel or, in effect, no counsel.

Under certain circumstances the extra judicial acts of police authorities may affect the voluntariness of a plea. See *Ellis v. Boles*, 251 F. Supp. 1021 (D. C. N. D., W. Va. 1966). It is clear, however, that violation of constitutional rights in obtaining a confession does not *per se* preclude a voluntary plea of guilty *U. S. v. Marin, supra.*

In the instant case the evidence shows that the extra judicial proceedings did not destroy the voluntary plea by the Respondent. To the contrary, his attorney testified that his investigation of the case revealed that here was evidence to the extent of two eye witnesses who would identify the appellant as the murderer. There is no evidence that the Respondent ever advised his attorney of any defense he had to the charge against him, other than the defense of alibi.

In this *habeas corpus* proceeding the burden was on the Respondent to prove the allegations of his petition by a preponderance of the evidence. *Vanater v. Boles*, advance sheet No. 10726, dated May 24, 1967 (4th Cir.). The only evidence that the Respondent was coerced or misled, to plead guilty is his own testimony, which testimony is sharply contradicted by other witnesses. The record clearly indicates that the trial judge accepted the guilty plea of the

Respondent and that the Respondent understood the consequences. The plea was freely and voluntarily made, with full knowledge of its consequence.

The general standard to be applied in determining whether representation by counsel is so inadequate as to amount to a denial of representation by counsel is whether the assistance is effective as distinguished from bad faith, sham, mere pretense; or lack of opportunity for conference and preparation. *Nutt v. U. S.*, 335 F. (2d) 817 (10th Cir., 1964) and cases cited therein.

The evidence clearly shows defense counsel was retained by the Respondent. By the Respondent's own testimony there was never any question but that counsel would represent him in a murder trial, if he desired a trial. The Respondent made the decision to plead guilty and his attorney agreed to represent him and negotiate a plea. The record indicates the Respondent's attorney had many conferences with him and that his attorney was thoroughly familiar with the case. His attorney testified that he reviewed the Respondent's rights with him and explained the consequences of the various alternatives the Respondent might choose. The fact that the attorney may have advised the Respondent that if he stood trial he stood in jeopardy of a death sentence does not itself support a claim of coercion. It is a lawyer's duty to advice his client of risks involved. *Brown v. Smyth*, 271 F. (2d) 227 (4th Cir., 1959).

The Respondent was properly, effectively and ably represented by counsel, there is no question but that the Respondent understood the consequense of his plea, and the plea was not a result of coercion. Since the Court had found that the plea was voluntary, and in the absence of any showing of prejudice to the Respondent, the Respondent had waived all but jurisdictional defects. *Vanater v. Boles, supra.*

The Respondent through counsel, asked to be allowed to enter a plea of guilty to the offense of murder with recommendation to the mercy of the Court. The plea was agreed to by the State, and by the Court, and a consent verdict was returned by the jury and was published by the Clerk of Court. The decision to enter a plea of guilty was made by the Respondent.

The Respondent alleged that he did not know what sentence he was going to get. However, he sat with his attorney as the Court instructed the jury foreman to sign the consent verdict. He heard the judge state that the sentence was a mandatory life sentence. No statements, or objections, were given to the Court concerning the proceedings. No evidence was presented at the *habeas corpus* hearing to show that the Respondent did not have the mental capacity to enter the guilty plea.

In some jurisdictions, the rule that a trial judge must ascertain whether or not an accused understands the consequences of his plea of guilty before the court accepts it, has been established by statute and in other jurisdictions the rule has been established by case law. It must be pointed out that the existence of this duty upon a trial judge is not, by any means, universally accepted. Most of the trial judges in this State conduct a rather thorough inquiry into whether or not the accused understands the effect of his plea of guilty. See generally: *Carroll v. MacDougall*, 248 S. C. 141, 149 S. E. (2d) 343 (1966) *Thompson v. State*, 248 S. C. 415, S. E. (2d) (1966.)

The plea of guilty to murder with recommendation to the mercy of the court carries a mandatory penalty of imprisonment during the whole lifetime of the prisoner. 1962 S. C. Code of Laws, Section 16-52, Section 17-553.4; *State v. Mouzan*, 231 S. C. 655, 99 S. E. (2d) 672 (1957); *State v. Chasteen*, 228 S. C. 88, 88 S. E. (2d) 880 (1955).

The requirements of due process are fulfilled if the accused is clearly informed of the offense charged and understandingly pleads guilty. 16 A. C. J. S. 643, Constitutional Law, Section 588; 14 Am. Jur. 951, Criminal Law, Section 270.

A plea of guilty must be voluntarily made, with full understanding of its consequences. The plea must be received with caution and the court must be satisfied that the defendant was of sound mind and did not plead guilty because of overpersuasion or delusive hope of pardon. However, the mere belief of the defendant that he would receive a lighter punishment is not sufficient ground for setting aside a plea of guilty. The plea cannot be entered until defendant has been advised by the court of his rights and consequences of the plea. When such a plea is accepted and entered upon the records it is a conviction of the highest order. 4 Wharton's Criminal Procedure, Sec. 1900, pp. 767, 768.

In applying the general rule that although one offering a plea of guilty is represented by counsel the court has a duty before accepting it, to inform the accused of its consequences or see that he is or was so informed, if it does not affirmatively appear that he already has knowledge thereof, the question of when the duty requires the court either to determine that the information was given, to direct that it shall be given, or to give it to the defendant directly, depends upon the state of the record and the facts appearing at the time the plea is offered. In a number of cases the view has been taken that the accused, represented by counsel, was on the record sufficiently informed of the consequences of his plea of guilty that no further admonition by the court as to such consequences was necessary, or, at least, that the failure to give such further admonition was not prejudicial error. 97 A. L. R. (2d) 549, 557.

The case of *McGrady v. Cunningham* (CA 4 Va.), 296 F. (2d) 600, 96 A. L. R. (2d) 1286, cert. den. 369 U. S. 855, 8 Led (2d) 14, 82 S. Ct. 944, was a *habeas corpus* proceeding in which it appeared that the petitioner had been prosecuted for murder in the Virginia Circuit Court under an indictment in the Virginia statutory form, which did not distinguish between murder in the first degree and murder in the second degree. Under the erroneous advice of his counsel that upon a plea of guilty he would be sentenced for murder in the second degree to from 5 to 20 years, the petitioner pleaded guilty, with the understanding that he was thereby pleading guilty to murder in the first degree. No inquiry was made of the accused by the court as to whether he understood the nature of his plea of guilty and the punishment that might be meted out to him as a result thereof; and no inquiry was made of the accused personally, before imposition of a sentence of life imprisonment for murder in the first degree, as to whether he had anything to say as to why he should not be sentenced. On an appeal by the petitioner, a decision of the United States District Court dismissing the petition without a plenary hearing, was affirmed by the Fourth Circuit, which held that the sentence was not invalidated by the absence of the inquiries.

In *Bailey v. MacDougall*, 247 S. C. 1, 145 S. E. (2d) 425, 428, the S. C. Supreme Court said:

> "A plea of guilty is a confession of guilt made in a formal manner and is equivalent to and as binding as a conviction after a trial on the merits. It has the same effect in law as a verdict of guilty and authorizes the imposition of the punishment prescribed by law. A plea of guilty must be freely and understandingly made. A plea of guilty, if induced by promises which deprive it of the character of a voluntary act, is void and should be set aside."

In *Tillman v. State*, 244 S. C. 259, 136 S. E. (2d) 300 (1964), the S. C. Supreme Court held that the possibility of a ". . . death sentence following a trial before a jury" was not coercion and would not render the guilty plea involuntary. In that case the defendant's attorney had bargained successfully with the prosecution for a guilty plea on a lesser charge than murder.

A plea of guilty should not be accepted from one who does not know, or who, at the time of arraignment, asserts that he does not know, whether or not he has committed the crime charged; and such a plea is insufficient on which to base a judgment of conviction. 22 C. J. S. 1176, Crim. Law, Sec. 423 (1).

A plea of guilty obtained by illegal coercion will not support a conviction based on it. Thus, to authorize the acceptance and entry of a plea of guilty, and judgment and sentence thereon, the plea must be entirely voluntary; and it must not be induced by fear, by misrepresentation, by persuasion, or by the holding out of false hopes, nor be made through inadvertence or by ignorance. After proper advice by counsel, the plea of guilty must be freely and understandingly made by one competent to know the consequences thereof. However, where a party appearing for trial in a felony case plainly appears to the court to be of sound mind, the court need not hear proof of his mental capacity before receiving his plea of guilty, unless and until the issue has been raised by evidence or reliable information has come to the court. 22 C. J. S. 1176-1180, Crim. Law, Sec. 423(2).

Before accepting and entering a plea of guilty, the court should and under rules or statutes so providing, such as Rule 11 of the Federal Rules of Criminal Procedure, 18 U. S. C. A., must, satisfy itself of the voluntary character of the plea. Even in a state in which the trial court ordinarily has no duty, statutory or by custom, to ascertain

before accepting a plea of guilty whether it is being given without mistake or misapprehension, where the case involves more than a simple issue and the response to the indictment is in such terms as ought to make the court aware that accused is not responding without qualification, the court should clear up the matter with such further inquiry into the factual situation, in open court, as will disclose that accused does in real substance know what he is doing. Whenever, after such investigation as may be deemed necessary, the court shall have reason to doubt the truth of a plea of guilty, it is the duty of the court to direct a plea of not guilty, and order trial on the issues. In determining whether the plea was voluntarily made, the plea must be viewed as of the time it was submitted to the court. Where accused is represented by counsel at the time he offers a plea of guilty, the court may rely on the representations of counsel that the plea is voluntary, and the court is not required to conduct an interrogation of accused personally. 22 C. J. S. 1181-1182, Crim. Law, Sec. 423(3).

In general, where the court is required by rule or statute to satisfy itself that the plea of guilty was freely and understandingly made, the form and manner of the examination which will so satisfy the court are a matter within the discretion of the court, to be exercised in the manner best suited to the parties and the offense; and it is not essential that the court's examination or investigation be made a matter of record. 22 C. J. S. 1183, Crim. Law, Sec. 423(3).

While the rule is not universal, particularly with respect to misdemeanor cases, it is a frequently recognized right of accused and duty of the court where accused pleads guilty, sometimes by virtue of express statutory provision, that the court should advise and inform accused, or see that he is advised and informed, as to his rights, the nature of his act, and its consequences, and should see that a

reasonable time has been allowed before having the plea entered so that accused could, if he desired, retract it and plead not guilty. However, the court does not have to force counsel on accused pleading guilty, nor does the court forcibly have to prevent him from pleading guilty. The rule applies especially where accused appears without counsel, and even though he has waived counsel; but it has been held that where accused is represented by counsel, the court is not under duty to inform accused of the effect of his entry of a plea. 22 C. J. S. 1183-1185, Crim. Law, Sec. 423(4).

Under some statutes, the court is not required to inform accused precisely what fine or jail sentence could or would be pronounced, or is provided by statute, for the particular offense with which he is charged; and it has been held to be erroneous for a judge to tell accused what his punishment would be before he entered a plea of guilty. Certainly it is not a prerequisite to a court's acceptance of a plea of guilty that it make known to accused every conceivable defense that may be available or determine from accused that he has knowledge thereof. The court is not required to advise accused of the effect of a plea of not guilty where accused started to plead guilty but changed the plea to not guilty. 22 C. J. S. 1186, Crim. Law, Sec. 423(4).

A plea of guilty is a formal criminal pleading and leaves the court nothing to do but to give judgment and sentence. Provided the court has jurisdiction of the crime charged, a plea of guilty is a confession of guilt, made in a formal manner, and under such circumstances a plea of guilty is binding on accused. It is an admission, or conclusive admission, or proof, of guilt. Except that it may be withdrawn and another plea substituted for it, a plea of guilty is equivalent to, and as binding as, a conviction after a trial on the merits. It has the same effect in law

as a verdict of guilty, and authorizes the imposition of the punishment prescribed by law. Accordingly, it leaves no issue for the jury. 22 C. J. S. 1188-1190, Crim. Law, Sec. 424(1).

A plea of guilty is an implied admission of accused's sanity, and the court's action in accepting the plea is necessarily an affirmation of its belief in defendant's sanity. 22 C. J. S. 1197-1198, Crim. Law, Sec. 24(5).

The requirements of due process of law are fulfilled if the accused is clearly informed of the offense charged and understandingly pleads guilty. 16A C. J. S., Constitutional Law, Sec. 588, page 643.

It has been held that there has not been a deprivation of due process of law even where there was a failure of the prosecutor to make a promised recommendation of a light sentence to the court and where there was an imposition of a heavy sentence by the court. *State v. Miller*, 84A (2d) 459, 16 N. J. Super. 251; Cert. den. 73 S. Ct. 379, 342 U. S. 934, 96 L. Ed. 695, 16A C. J. S., Constitutional Law, Sec. 588, page 643.

The acceptance of a plea of guilty may constitute a denial of due process, however, where such plea was induced by coercion, or where it was made under the influence of drugs (*Lobaugh v. State*, 82 N. E. (2d) 247, 266 Ind. 548), or where it was made without the advice of counsel, or was made under circumstances which rendered its acceptance fundamentally unfair or shocking to a sense of justice. 16A C. J. S., Constitutional Law, Sec. 588, page 644.

Habeas Corpus is not the proper remedy to secure an accused's release from the penitentiary after sentence on a plea of guilty, on grounds that the plea was induced by fear and that the defendant did not have a jury trial. *Ex Parte Darling*, 235 N. W. 582, 120 Neb. 829, 39 C. J. S., *Habeas Corpus*, Sec. 29, page 520.

When a plea of guilty is obtained by promises by the police this is not grounds for a Writ of *Habeas Corpus* especially where the defendant knew that the judge alone did the sentencing. *Commonwealth v. Ashe,* 15A (2d) 409, 141 P. Super. 408. 39 C. J. S., *Habeas Corpus,* Section 13, page 442.

Where the accused was induced to plead guilty by representations of the assistant county attorneys that he was eligible for a suspended sentence, whereas in fact the accused on account of a prior conviction was not eligible for a suspended sentence, the judgment revoking suspension of sentence on that account was void and accused was imprisoned without "due process of law". *Ex Parte Farrar,* 126 P. (2d) 547, 74 Okla. Cr. 390. 39 C. J. S., *Habeas Corpus,* Section 13, page 442.

Evidently, if a conviction is obtained on a plea of guilty made in reliance on an agreement that is repudiated or dishonored, the effect may be one of such unfairness as to constitute a denial of due process and result in a void judgment which may well be deemed subject to attack by *coram nobis* at any time. *People v. Sullivan,* 276 App. Div. 1987, 96 N. Y. S. (2d) 266 (1950), 62 A. L. R. (2d) 467. See also 16A C. J. S. 645, Constitutional Law, Sec. 589.

Where a prisoner's guilty plea was allegedly induced by a promise of a lighter sentence by a representation of the district attorney's office, and the prisoner could not have known that the promise would not be performed until the sentence was pronounced, it was held that a motion for a writ of error *coram nobis* was proper. *People v. Painter,* 29 Cal. Reptr. 121.

Where there is an agreement whereby the prosecuting attorney promises the performance of certain acts in consideration of the filing of a plea of guilty it has been that these promises are not binding on the court and the plea is generally treated as an ordinary plea of guilty. Am.

Cases 1914 A, 451; 113 A. L. R. 814; 14 Am. Jur., Criminal Law, Section 273, page 953.

A plea bargain is an agreement by one accused of a crime to plead guilty to a certain crime in return for a promise from the prosecuting attorney, the court, or both that the accused will receive a moderate sentence or immunity from prosecution for other offenses. Plea bargains may involve matters solely within the discretion of the trial judge, or of the prosecuting attorney, or within the discretion of both. Thus, the question arises, who are the necessary parties to the agreement. Since sentencing is a function of the trial judge, plea bargains involving promises of less severe sentences necessarily require the court's consent to be enforceable. However, in many plea bargains the accused pleads guilty to one offense and receives a promise of immunity from prosecution for other offenses for which he is or may be charged. 23 La. L. Rev. 783.

Plea bargains have been recognized as a useful and necessary part of the executive and judicial criminal process which furnishes a means of disposing of numerous cases which would otherwise clog the court dockets. When properly used it has been looked upon favorably by lawyers, prosecuting attorneys, courts and defendants alike. 50 Yale L. J. 107, 23 La. L. Rev. 783, 785.

Enforcement of a plea bargain involving a plea of guilty to an offense in return for a promise from the prosecuting attorney which is within his power to fulfill seems justifiable even though the plea bargain lacks the court consent. Not only is the prosecuting attorney a public representative whose promise is a pledge of the public faith which should be duly kept, but it seems a defendant who pleads guilty to an offense in consideration of a plea bargain would be giving up the same substantial right, the right to stand trial, whether the court consented to the plea bargain or not. 23 La. L. Rev. 783, 786.

The guilty plea has become an important factor in the administration of American criminal law. Guilty pleas are prevalent in the state courts, and in the federal courts pleas of *nolo contendere* and guilty pleas represent an average of 79 percent of the disposition of all criminal defendants for the fiscal years 1956 through 1962. The commonplace practice of plea bargaining, compromise by prosecuting attorneys with criminal defendants or their counsel to obtain guilty pleas, is in part responsible for the high incidence of such pleas. There is a broad range of plea arrangements currently used by prosecutors. The three most common are the sentence recommendation, the plea to a lesser included offense, and the dismissal of charges in an indictment, information or other charging paper. Many other types of agreements are made with defendants to induce a plea. These include promises not to prosecute codefendants, promises to arrange for the defendant or a codefendant to be incarcerated in a particular prison, promises to have the defendant or a codefendant tried in the juvenile court, recommendations for presentence investigations, recommendations for concurrent sentences, and agreements *not to oppose probation.* Promises of immunity by the prosecutor can also be used to induce guilty pleas. 112 Univ. of Pa. L. R. 865 and 866.

In New York some of the most common reasons submitted by the district attorneys have been *difficulty in proving the indictment,* mitigation of harsh penalties, *unreliability of state's* witnesses, conflicting evidence, reluctant complainant, *lack of adequate identification* and *lack of corroboration.* A significant reason which may be apparent from the records is probably the time and cost savings involved in disposing of cases of guilty pleas. 112 Univ. of Pa. L. R. 865, 868.

There has been a growing recognition by courts of the existence and persuasiveness of plea bargaining. To

a still indefinite extent the practice has received official sanction. A federal district court said that guilty pleas are commonplace occurrences. In many courts, particularly state courts, a defendant's lawyer and the prosecutor may bargain not only on the offense, but also on the length of the sentence which the prosecutor will recommend. *Barber v. Gladden*, 220 F. Supp. 308 (D. Ore. 1963), 112 Univ. of Pa. L. R. 865, 870.

In North Carolina the federal district court specifically assumed the "constitutional validity of the time-honored compromise plea." *Anderson v. N. C.*, 221 F. Supp. 930, 934 (W. D. N. C. 1963), 112 Univ. of Pa. L. R. 865, 871.

Legal safeguards have developed for defendants who plead guilty, whether or not the pleas are the result of bargaining. The general standard for accepting a guilty plea has been articulated in Rule 11 of the Federal Rules of Criminal Procedure: "A defendant may plead . . . guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made *voluntarily* with *understanding* of the nature of the charge." (Emphasis added.) 112 Univ. of Pa. L. R. 865, 871.

A guilty plea is tantamount to a conviction; once the plea is validly accepted by the court, the defendant has waived all the constitutional, statutory and judicially created safeguards afforded him for a trial determination of guilt, the imposition of sentence is the only judicial action remaining. 112 Univ. of Pa. L. R. 865, 871. *Machibroda v. U. S.*, 368 U. S. 487 (1962), *Kercheval v. U. S.*, 274 U. S. 220, 223 (1927).

The Fifth Circuit held that a "plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor or his own counsel, must stand unless induced by threats (or promises to discontinue improper

harrassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business *(e. g., bribes). Shelton v. U. S.*, 246 F. (2d) 571, 572 (Fifth Circuit 1957) (*en banc* majority). 112 Univ. of Pa. L. R. 865, 873.

It is difficult to determine where the concept of voluntariness ends and understanding begins. The Ninth Circuit has recently stated that for purposes of Rule 11 the trial court must satisfy itself that the defendant understood "the meaning of the charge, and what acts amount to being guilty of the charge, and the consequences of pleading guilty thereto." *Kadwell v. U. S.*, 315 F. (2d) 667, 669 (Ninth Circuit, 1963). 112 Univ. of Pa. L. R. 865, 874.

The Ninth Circuit has suggested that a prosecutor's failure to comply with his promise would violate due process. *Dillon v. U. S.*, 307 F. (2d) 445 (Ninth Circuit, 1962). 112 Univ. of Pa. L. R. 865, 877.

The guilty plea involves a waiver of all defenses and evidentiary questions which do not relate to the jurisdiction of the court. *U. S. ex. rel. Staplers v. Pate*, 222 F. Supp. 998, 1002-03 (N. D. Ill. 1963). If a guilty plea is contemplated as a possibility, defense counsel may decide to discuss a plea arrangement with the prosecutor. *Williams v. Kaiser*, 323 U. S. 471, 475-476 (1945). 112 Univ. of Pa. L. R. 865, 888.

A defendant's unfulfilled expectation of leniency, even if inspired by counsel, is not normally a ground for relief. *People v. Schmidt*, 10 Ill. (2d) 221, 139 N. E. (2d) 726 (1957). 112 Univ. of Pa. L. R. 865, 890.

Solicitor Leatherwood did not confer with Bailey but in all instances negotiated with Mr. Wyche, Bailey's attorney. Neither the Solicitor nor Mr. Wyche knew of any attempts by anyone to coerce Bailey into agreeing to the guilty plea.

The Respondent knew the value of the commitment statement made by the Solicitor, and explained to him by his retained counsel. The agreement and guilty plea were not induced by threats, misrepresentation or improper promises. The sole promise of the Solicitor, *to recommend parole or pardon* after a period of ten years confinement, was fulfilled by the Solicitor. (F. 17.)

In *Cortez v. United States,* 337 F. (2d) 669 (1964), the district court held a hearing on a petition and found that the petitioner had failed to sustain his burden of showing that his plea of guilty was not voluntary. The United States Court of Appeals, Ninth Circuit, upheld this finding. The petitioner contended that a "deal" had been arranged between the United States Attorney and his attorney whereby he would plead guilty and certain charges would be dropped against him and his wife. The Court took ". . . judicial notice of the fact that the vast majority of those who are indicted for federal crimes plead guilty . . ." and "In a sense, it can be said that most guilty pleas are the result of a 'bargain' with the prosecutor. But this, standing alone, does not vitiate such pleas." The Court also stated that the lawyer is bound to advise his client that ". . . neither the lawyer nor the prosecutor nor anyone else can bargain for the Court." The important thing is that a guilty defendant ". . . understands his situation, his rights, and the consequences of the plea, and is neither deceived nor coerced." See also: *Thomas v. Warden,* Md. Penitentiary, 236 F. Supp. 499 (1964).

In *Tillman v. The State, et al.,* 244 S. C. 259, 136 S. E. (2d) 300 (1964), the Court held that the possibility of a ". . . death sentence following a trial before a jury" was not coercion and would not render the guilty plea involuntary. In that case the defendant's attorney had bargained successfully with the prosecution for a guilty plea on a lesser charge than murder.

Judge Grimball's finding that Bailey's plea of guilty was not voluntarily made was clearly erroneous and was correctly set aside by the S. C. Supreme Court. If Bailey's rationale had been adopted then all guilty pleas would be vitiated if they were entered as a result of a bargain with the prosecution. The circumstances of this case show that the inducement for Bailey's guilty plea was not one which overcame his ability to make a voluntary decision. The evidence shows that the trial court heard the matter at some length, found that Bailey was in fact guilty, that at the time of his plea he was fully and accurately advised, and that his plea was voluntary. Bailey's guilty plea was entered in open court freely, voluntarily and with full advice of counsel and the Court. Bailey's plea of guilty was not a compromise with justice. Through his attorney he was acting knowingly and intelligently, and the ultimate decision to plead guilty was neither the product of deception nor coercion.

The South Carolina Supreme Court reversed the order of Judge Grimball and remanded, discharging the Writ of *Habeas Corpus. Bailey v. MacDougall,* 247 S. C. 1, 145 S. E. (2d) 425 (1965). The opinion is set out in the Appendix. (Appendix A, pp. 53-64.) The main portion of the opinion is set out in the order of Judge Hemphill (Appendix E, pp. 70-78) to wit:

> "The petition of the respondent is specific in that it is alleged that the guilty plea was induced by the written promise and agreement of the Solicitor and the Chief of Police of the City of Greenville, that if he would plead guilty he would only serve ten years and possibly less. There is no proof of this fact in the record. The promise and agreement, a copy of which said agreement was attached to the respondent's petition, is to the contrary. The written promise made by the Solicitor and the Chief of Police is definite, clear, explicit and unambiguous. The only promise made in

such letter was that if the respondent entered a plea of guilty to murder with a recommendation to mercy that these officers would 'after the said Ray Bailey has served for a period of not exceeding ten years, recommend to the Board of Pardons or Governor a pardon or parole.' It is stipulated that the Solicitor never conferred with the respondent and that the written promise and agreement was explained to him by his employed counsel.

"A study of the entire record in this case leads us to the conclusion that the respondent has failed to prove by a preponderance of the evidence that he was misled, deceived or over-reached in any way. There is nothing to show that the plea was induced by coercion, false promises or misrepresentations. The respondent's plea of guilty was freely, voluntarily and understandingly made after full consultation with his brother and his employed counsel. The record is entirely free of any evidence that the plea of guilty entered by the respondent was induced or in any way influenced by any improper act or advice of his counsel but was entered after full disclosure to him by his counsel of its nature and possible consequences. There is a total absence of any proof that any one connected with the State, or even the respondent's counsel, did or said anything which destroyed the voluntary character of his plea of guilty.

"It is our conclusion, under all the facts and circumstances as revealed by the record in this case, that the respondent was not deprived of any rights guaranteed to him under the Constitution of the United States or of this State. We further conclude that the finding by the lower Court that respondent's plea of guilty was not voluntarily made is erroneous and should be set aside. 145 S. E. (2d) 432."

The order of Judge Hemphill is set out in the Appendix. (Appendix E, pp. 70-78.) He held that:

"The United States District Court has the discretionary power to hold an evidentiary hearing on an ap-

plication for *habeas corpus* challenging the validity of a state criminal conviction. *Fay v. Noia,* 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. (2d) 837.

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"In the instant case a plenary hearing is not required. Justice would not be served by ordering a full hearing or by awarding any or all of the relief sought by the petitioner. The State Court records show that the petitioner was not denied due process of law. The record was fully developed and explored at state level.

"The facts of the record are not in dispute and show no deprivation of constitutional rights. Applying each of the criteria to the instant case, the petitioner is not entitled to a hearing. The State Courts have given opinions, conclusions of law, and finding of fact, and have applied the proper standard of federal law setting forth the constitutional rights of the petitioner. The records show application by the State Courts of the correct constitutional standards. The record shows that the petitioner has received full and fair hearings on the testimony concerning all the allegations raised in the present petition."

• • •

"The record shows the evidence taken at the original trial, the findings of fact and the legal standards applied. The petitioner has been afforded the one full hearing to which he is entitled and the matter is concluded as to the taking of evidence at the discretion of the United States District Court.

"The petition is discharged."

Question two (2) was the opinion of the Fourth Circuit in this matter without basis in law or fact.

The facts in this case were set out in the District Court opinion. See *Bailey v. MacDougall,* . . . F. Supp. . . ., (1967). (Appendix E, pp. 70-78.)

The Fourth Circuit held that "After serving about 14 years Bailey escaped to North Carolina and surrendered. Later he escaped to Montana, where he was captured." To

this should be added the fact that as soon as he heard of the decision of the South Carolina Supreme Court he jumped bond. He was captured in Arizona and was returned to South Carolina. The federal *habeas corpus* proceedings began upon his return to South Carolina.

The Fourth Circuit held that "We hold that Bailey's arraignment was defective and the record fails to establish he understood the consequences of his plea." Upon his arrangement Bailey pleaded not guilty. Bailey withdrew his original plea and pleaded guilty with recommendation to mercy. Bailey claimed that the promise rendered his plea involuntary and that his arraignment was constitutionally defective. There was never any question concerning the legality of the arraignment. The sole question related to the voluntariness of the guilty plea.

The Fourth Circuit held that "In South Carolina, a defendant can plead guilty to murder only before a jury, which, pursuant to the plea, returns a verdict of "guilty of murder with the recommendation to the mercy of the court." This was not a correct statement of the law of South Carolina. Under Section 17-553.4, 1962 S. C. Code of Laws, a defendant can now plead guilty without the formality of a jury verdict.

The plea of guilty to murder with recommendation to the mercy of the court carries a mandatory penalty of imprisonment during the whole lifetime of the prisoner. 1962 S. C. Code of Laws, Section 16-52.

All of the evidence that can be marshalled is contained in the record. The material facts are uncontradicted.

The evidence clearly shows defense counsel was retained by the Respondent. By the Respondent's own testimany there was never any question but that counsel would represent him in a murder trial, if he desired a trial. The Respondent made the decision to plead guilty and his attorney agreed to represent him and negotiate a plea. The

record indicates the Respondent's attorney had many conferences with him and that his attorney was thoroughly familiar with the case. His attorney testified that he reviewed the Respondent's rights with him and explained the consequences of the various alternatives the Respondent might choose.

In the instant case the evidence shows a voluntary plea by the Respondent. His attorney testified that his investigation of the case revealed that there was evidence to the extent of two eye witnesses who would identify the Respondent as the murderer. There is no evidence that the Respondent ever advised his attorney of any defense he had to the charge against him, other than the defense of alibi.

The Respondent knew the value of the commitment statement made by the Soilcitor, and explained to him by his retained counsel. The agreement and guilty plea were not induced by threats, misrepresentation or improper promises. The sole promise of the Solicitor, to recommend parole or pardon after a period of ten years' confinement, was fulfilled by the Solicitor.

Bailey clearly understood that it was his decision, and his decision alone, to decide whether he wished to go to trial or whether he wished to plead guilty. After he decided to plead guilty his lawyer was to make certain that there was reduced to writing a statement by the solicitor and the chief of police that they would recommend a pardon or parole after Bailey had served not more than ten years.

The defense attorney advised Bailey that if he did not participate in the shooting he should not plead guilty. The attorney explained that the plea arrangement meant a life sentence would be imposed, and that it did not mean the Governor would have to grant parole or pardon. He added that ordinarily the Governor would give great weight to the recommendation of the solicitor and the chief of police. Bailey agreed to plead guilty.

Bailey testified that he was not in Greenville at the time the police officer was killed, and that at first he refused to plead guilty. He agreed to change his plea because he was in fact guilty and he was certain any agreement the solicitor made would be carried out.

His attorney, out of an abundance of caution, required the solicitor and chief of police to put their promise in writing. They signed this statement:

> "This will confirm our conversation that in the event that Ray Bailey enters a plea of guilty with recommendation to mercy in the case now pending against him in the General Sessions Court for Greenville County that I will, knowing the facts of the case and the circumstances surrounding same, after the said Ray Bailey has served for a period not exceeding ten years, recommend to the Board of Pardons or Governor a pardon or parole."

The Governor of South Carolina had absolute discretion as to the granting of paroles and pardons. When the Respondent was due for consideration under the terms of the agreement the probation and parole system for the State had been changed, placing the parole function in the hands of a Parole Board with discretionary powers. The record indicates that the Respondent knew that the written agreement was not a guarantee of freedom within ten years or less. He knew that there was a possibility that he might get a parole. His counsel stated to the Respondent that "* * * if you were not there and did not participate in the shooting I would advise you under no circumstances to enter any plea of guilty of any kind * * *". The Respondent conferred with his brother and his counsel and agreed to plead guilty. (Tr., 16, 17.)

The voluntary nature of the guilty plea in this case was shown by the fact and content of the written agreement by the Solicitor and the Chief of Police to recommend parole

for Respondent within ten years. At the time this agreement was made a recommendation to parole by a solicitor to the Governor carried great weight, just as the recommendation to parole by a Solicitor at the present time to the S. C. Probation, Parole and Pardon Board carries great weight. However, the Respondent knew that "* * * this recommendation did not mean that the Governor would have grant the parole or the pardon, but I did state to him that, ordinarily, the Governor would give great weight to the recommendation * * *". (Tr., 17, 18.)

Solicitor Leatherwood did not confer with Bailey but in all instances negotiated with Mr. Wyche, Bailey's Attorney. Neither the Solicitor nor Mr. Wyche knew of any attempts by anyone to coerce Bailey into agreeing to the guilty plea.

There was no necessity for any inquiry to be made to determine whether Bailey's plea was voluntary or whether he understood the charges against him and the consequences of his plea. The attorneys of South Carolina are officers of the Court. They do not offer a plea of guilty on behalf of a defendant unless the defendant has requested him to do so.

The Respondent, through counsel, asked to be allowed to enter a plea of guilty to the offense of murder with recommendation to the mercy of the Court. The plea was agreed to by the State, and by the Court, and a consent verdict was returned by the jury and was published by the Clerk of Court. The decision to enter a plea of guilty was made by the Respondent.

The plea of guilty in this capital case was accepted cautiously and not until after the Respondent had been fully advised by the defense counsel of his rights and the consequences of his plea. The court was satisfied that the Respondent acted voluntarily and with full knowledge, appreciation and understanding of the nature and consequences of the plea.

No particular form or ritual is required. It clearly appeared that the Respondent understood the consequences of his plea. The evidence discloses, however, that his attorney had made inquiry to determine Bailey's understanding of the consequences of his plea. The judge asked him no questions because the appellant, through counsel, asked to plead guilty. Bailey's counsel explained all aspects of the matter to Bailey. There was never any question in the mind of Bailey's counsel but that Bailey knew exactly what he wanted to do. Bailey had a college education, was from a respected North Carolina family and had had experience with Court procedure. Bailey had won a stay of extradition from the Courts of North Carolina. Upon hearing that the State of South Carolina had won a favorable extradition opinion from the U. S. Supreme Court he fled to Georgia, was captured, and was finally sent to South Carolina for trial.

Bailey contends he was denied due process of law because the court did not advise him of the consequences of his plea. Bailey fully understood the consequences of his plea, and knew the direct consequences—the length of the sentence to be served. Bailey also understood the consequences of the plea agreement.

The Fourth Circuit cited the fact that the "Institute of Judicial Administration, ABA, Standards Relating to Pleas of Guilty, § 1.5, p. 29 (tentative draft 1967) suggests the plea agreement should be disclosed to the court, and that the court should advise the defendant that recommendations of the prosecutor are not binding on the court" The solicitor, Bailey's counsel and Bailey clearly understood that the guilty plea would bind the court to a sentence of life. The statutory law of S. C., then as now, does not grant any discretion to the trial judge. Bailey knew the exact sentence he would receive.

The Respondent alleged that he did not know what sentence he was going to get. However, he sat with his attorney as the Court instructed the jury foreman to sign the consent verdict. He heard the judge state that the sentence was a mandatory life sentence. No statements, or objections, were given to the Court concerning the proceedings. No evidence was presented at the *habeas corpus* hearing to show that the Respondent did not have the mental capacity to enter the guilty plea.

The State courts are not bound by the Federal Rules, but are bound by the requirements of due process. The record before this Court shows that the Trial Judge had no knowledge of the agreement made between the prosecutor and the counsel for the accused, who in turn presented the agreement to the accused. There was no necessity for the court to admonish the accused concerning the consequences of the pleas because the consequences were automatic and were given to the Respondent by his counsel.

The Respondent was informed of the crime with which he was charged and was informed of the consequences of the conviction thereon. He knew that he would receive a life sentence.

The Respondent was properly, effectively and ably represented by counsel, there is no question of his plea, and the plea was not a result of coercion.

Judge Grimball's finding that Bailey's plea of guilty was not voluntarily made was clearly erroneous and was correctly set aside by the S. C. Supreme Court. If Bailey's rationale had been adopted then all guilty pleas would be vitiated if they were entered as a result of a bargain with the prosecution. The circumstances of this case show that the inducement for Bailey's guilty plea was not one which overcome his ability to make a voluntary decision. The evidence shows that the trial court heard the matter at some length, found that Bailey was in fact guilty, that the time

of his plea he was fully and accurately advised, and that his plea was voluntary. Bailey's guilty plea was entered in open court freely, voluntarily and with full advice of counsel and the Court. Bailey's plea of guilty was not a compromise with justice. Through his attorney he was acting knowingly and intelligently, and the ultimate decision to plead guilty was neither the product of deception nor coercion.

The Supreme Court of South Carolina concluded this judgment was erroneous. The State Supreme Court emphasized that the promise was only to recommend parole or pardon and that it had been kept, that the written statement was unambiguous, and that Bailey's attorney had explained to him that the Governor might not follow the recommendation. It concluded that the evidence did not disclose that the plea was induced by coercion, false promises, or misrepresentation, and that Bailey's plea was voluntary.

The South Carolina Supreme Court reversed the order of Judge Grimball and remanded, discharging the Writ of *Habeas Corpus. Bailey v. MacDougall*, 247 S. C. 1, 145 S. E. (2d) 425 (1965). The opinion is set out in the Appendix. (Appendix A, pp. 53-64.) The main portion of the opinion is set out in the order of Judge Hemphill (Appendix E, pp. 70-78), to wit:

> "The petition of the respondent is specific in that it is alleged that the guilty plea was induced by the written promise and agreement of the Solicitor and the Chief of Police of the City of Greenville, that if he would plead guilty he would only serve ten years and possibly less. There is no proof of this fact in the record. The promise and agreement, a copy of which said agreement was attached to the respondent's petition, is to the contrary. The written promise made by the Solicitor and the Chief of Police is definite, clear, explicit and unambiguous. The only promise made in such letter was that if the respondent entered a plea of guilty to murder with a recommendation to mercy that these officers would 'after the said Ray Bailey has

served for a period of not exceeding ten years, recommend to the Board of Pardons or Governor a pardon or parole.' It is stipulated that the Solicitor never conferred with the respondent and that the written promise and agreement was explained to him by his employed counsel.

"A study of the entire record in this case leads us to the conclusion that the respondent has failed to prove by a preponderance of the evidence that he was misled, deceived or over-reached in any way. There is nothing to show that the plea was induced by coercion, false promises or misrepresentations. The respondent's plea of guilty was freely, voluntarily and understandingly made after full consultation with his brother and his employed counsel. The record is entirely free of any evidence that the plea of guilty entered by the respondent was induced or in any way influenced by any improper act or advice of his counsel but was entered after full disclosure to him by his counsel of its nature and possible consequences. There is a total absence of any proof that any one connected with the State, or even the respondent's own counsel, did or said anything which destroyed the voluntary character of his plea of guilty.

"It is our conclusion, under all the facts and circumstances as revealed by the record in this case, that the respondent was not deprived of any rights guaranteed to him under the Constitution of the United States or of this State. We further conclude that the finding by the lower Court that respondent's plea of guilty was not voluntarily made is erroneous and should be set aside, 145 S. E. (2d) 432."

Bailey then applied to the United States District Court for a writ of *habeas corpus,* which was denied upon the basis of the state records without a plenary hearing.

The order of Judge Hemphill is set out in the Appendix. (Appendix E, pp. 70-78.) He held that:

"The United States District Court has the discretionary power to hold an evidentiary hearing on an

application for *habeas corpus* challenging the validity of a state criminal conviction *Fay v. Noia*, 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. (2d) 837.

• • •

"In the instant case a plenary hearing is not required. Justice would not be served by ordering a full hearing or by awarding any or all of the relief sought by the petitioner. The State Court records show that the petitioner was not denied due process of law. The record was fully developed and explored at state level.

"The facts of the record are not in dispute and show no deprivation of constitutional rights. Applying each of the criteria to the instant case, the petitioner is not entitled to a hearing. The State Courts have given opinions, conclusions of law, and finding of fact, and have applied the proper standard of federal law setting forth the constitutional rights of the petitioner. The records show application by the State Courts of the correct constitutional standards. The record shows that the petitioner has received full and fair hearings on the testimony concerning all the allegations raised in the present petition.

• • •

"The record shows the evidence taken at the original trial, the findings of fact and the legal standards applied. The petitioner has been afforded the one full hearing to which he is entitled and the matter is concluded as to the taking of evidence at the discretion of the United States District Court.

"The petition is discharged."

The Question Presented is: Was the guilty plea of the Appellant made voluntarily with understanding of the nature of the charge?

Under familiar principles of due process, a guilty plea cannot be accepted unless the defendant understands its consequences. At the arraignment the court made no effort to ascertain what Bailey understood, either through its own efforts or through counsel. This was not necessary because

he pled not guilty. Bailey later made a request, through counsel, that he be allowed to plead guilty. Bailey stood by his counsel when the request was placed before the court.

Rule 11 of the Federal Rules of Criminal Procedure provides that the court may refuse to accept a plea of guilty, and "shall not accept the plea without first determining that the pleas is made voluntarily with understanding of the nature of the charge." This rule was complied with in the present matter. The defense counsel had many years of legal experience and testified that there was no question concerning the voluntariness of the guilty plea by the appellant. (Tr., pp. 17, 27, 28.) The Respondent made a valid plea of guilty with the knowledge and appreciation of its consequences. In this *habeas corpus* proceeding the burden was on the Respondent to prove the allegations of his petition by a preponderance of the evidence. The only evidence that the Respondent was coerced or misled, to plead guilty is his own testimony, which testimony is sharply contradicted by other witnesses. The record clearly indicates that the trial judge accepted the guilty plea of the Respondent and that the Respondent understood the consequences. The plea was freely and voluntarily made, with full knowledge of its consequence.

Bailey did not produce one scintilla of evidence to back up his mere allegations. His case rested on his subjective testimony alone. The only reasonable inference to be drawn from all the facts and circumstances is that Bailey totally failed to prove his allegation that the guilty plea was involuntary. The evidence does establish that Bailey has not carried his burden of proving that the guilty plea was not voluntary. The dispute about the guilty plea, which must be adjudicated thirty years after the plea, demonstrates the fundamental unfairness and the lack of due process in attempting to place upon the state the burden of showing by a preponderance of the evidence the terms of an admittedly

unambiguous agreement. The State is placed in the position of having to attempt to prove what *might* have been in the mind of a defendant when he stood before the court, with competent legal counsel, and requests the court to allow him to enter a guilty plea. It is not only ridiculous, but preposterous, to try to prove a subjective thought

The Fourth Circuit held that "Plea bargaining that induces an innocent person to plead guilty cannot be sanctioned. Negotiation must be limited to the quantum of punishment for an admittedly guilty defendant." This rule of law, and holding by the Court, proves the case for the Petitioner. The State of South Carolina did not induce Bailey to plead. His counsel told him not to plead unless he *was* guilty. The negotiation was limited solely to the quantum of punishment because the statutory law of South Carolina set the punishment at life, with no court discretion.

Bailey raises several questions about plea bargaining. He does not urge the practice in itself is unconstitutional. He does claim the promise rendered his plea involuntary.

In *Kercheval v. United States*, 274 U. S. 220, 223 (1927), the Court said:

> "A plea of guilty differs in purpose and effect from a mere admission or an extra judicial confession; it is itself a conviction. Like a verdict of a jury, it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences."

The facts of this case show clearly that Bailey entered a plea of guilty, after proper advice and with full understanding of the consequences.

The Fourth Circuit stated that "Courts have not considered it necessary to inform the defendant of possible

collateral consequences when such consequences result from subsequent criminal convictions of the defendant or do not relate directly to the charge to which the defendant pleads guilty." The written agreement was a collateral consequence that did not relate to the charge to which he pled guilty.

The Fourth Circuit stated that "The question remains: Did the promise, even if fulfilled, induce the plea and deprive it of the character of a voluntary act?" The decision to plead guilty was made first by Bailey. His counsel told him that he should **not** plead guilty unless he was guilty. After Bailey made the decision to plead guilty his counsel then had the written agreement preserved. The written agreement related to a future event, the promise to **recommend** parole after ten years.

The requirements of due process are fulfilled if the accused is clearly informed of the offense charged and understandingly pleads guilty 16 A. C. J. S. 643, Constitutional Law, Section 588; 14 Am. Jur. 951, Criminal Law, Section 270.

There was no ambiguity in the guilty plea and there was no ambiguity in the agreement to recommend parole in the future. Bailey's counsel ascertained that Bailey understood the consequences of his plea. Bailey in fact understood exactly what he was doing.

Bailey had the burden of proving his allegations that the guilty plea was involuntary.

The Fourth Circuit states that "Fed. R. Crim., P. 11, as amended in 1966, requires the court to determine this even though the defendant is represented by counsel. Many states also impose such a duty. Others hold the requirement is satisfied where counsel sufficiently informs the accused." The State of South Carolina fully met the rule, as approved by this Court above, because Bailey's counsel had

completely informed the accused of the consequences of a guilty plea

In some jurisdictions, the rule that a trial judge must ascertain whether or not an accused understands the consequences of his plea of guilty before the court accepts it, has been established by statute and in other jurisdictions the rule has been established by case law. It must be pointed out that the existence of this duty upon a trial judge is not, by any means, universally accepted. Most of the trial judges in this State conduct a rather thorough inquiry into whether or not the accused understands the effect of his plea of guilty. See generally: *Carroll v. MacDougall,* 248 S. C. 141, 149 S. E. (2d) 343 (1966). *Thompson v. State,* 248 S. C. 415, 151 S. E. (2d) 221 (1966).

There is not now, nor was there at the time of Repondent's trial, any statutory requirement or court rule in South Carolina requiring the accused to be advised by the court as to the nature and consequences of his plea, but the S. C. Courts have always made a determination concerning the voluntariness of the plea.

In *Thompson v. State,* 248 S. C. 475, 151 S. E. (2d) 221, the S. C. Supreme Court held, at pp. 482, 483: "In some jurisdictions, the rule that a trial judge must ascertain whether or not an accused understands the consequences of his plea of guilty before the court accepts it, has been established by decisions of the court. In *Commonwealth v. Battis,* 1 Mass. 95, it was held that before the acceptance of a plea of guilty the accused must be admonished as to the consequences of such a plea and must be given a reasonable time to consider what the court has said to him regarding the plea. Since the *Battis* case many courts have declared that a plea of guilty should not be accepted until after careful inquiry by the court into the accused's under standing of the consequences of his plea. The existence of this duty upon a trial judge is not the

universal rule. In the last cited case the court affirmed a ruling denying relief sought by a *habeas corpus* petition, without a plenary hearing, upon the ground that the judgement on a plea of guilty under the indictment which specified neither the degree of murder charged nor the punishment authorized, and a sentence to life imprisonment, the state's penalty for first degree murder, were valid, although the trial court failed to inquire of the defendant whether he understood the nature of the plea and the punishment that might be inflicted as a result, where he was represented by counsel of his own choice."

In an annotation at 97 A. L. R. (2d), page 552, we find the rule stated as follows:

> "The fundamental right of an accused to be informed of the nature of the crime with which he is charged has usually been regarded as including the right to be informed of the consequences of a conviction thereof, and accordingly the courts appear to be in agreement that even in the absence of a statute or court rule directly imposing a duty to advise or admonish the accused as to the consequences of a plea of guilty, the court is required to determine, before receiving a plea of guilty, that the accused does understand the consequences of making such a plea, and to inform him of such consequences **if he is not already advised thereof.**" (Emphasis added.)
>
> "The fact that the accused had legal counsel may be a significant factor in determining if he was in fact informed of the consequences of his plea. Here, the appellant had counsel of his own choice and the trial judge has found, and there is no appeal from this finding of fact, that the appellant was informed of the consequences of his plea of guilty to murder with a recommendation to the mercy of the court. It is our view where an accused represented by counsel was sufficiently informed of the consequences of his plea of guilty that no further admonition by the court as to such con-

sequences was necessary, or, at least, that the failure to give such admonition was not prejudicial error."

The record of this case clearly shows no violation of due process in any areas of the proceedings. The accused was represented by competent counsel. The Respondent received due process and the fundamental fairness required in the administration of criminal justice. Defense counsel could and did adequately and effectively represent the Respondent. There was no deficiency in the State's case. The State Solicitor knew that a witness was reluctant to testify, however, the State could and would have gone to trial without that witness if the necessity had arisen.

The State Solicitor fulfilled his duty to justice and the State when he bargained for the guilty plea. He was reluctant to go to trial but he could have obtained a conviction.

The Court fulfilled its judicial duty in accepting a plea of guilty to the capital offense by satisfying itself that the plea was made freely and voluntarily with full knowledge of the consequences. The plea of not guilty at the arraignment was routine. The court satisfied itself, through the Solicitor, defense counsel and jury verdict that the guilty plea was voluntary. Had the Court questioned the Respondent it would have discovered that the accused honestly believed the written agreement with the prosecutor was not a guarantee of freedom within ten years or less, that he was not improperly influenced in his plea by the very fact of this agreement, and that there was only the possibility of a parole after the service of ten years.

The Respondent received a criminal trial with the full observance of all the due process requirements of such a trial. He is not entitled to an absolute release from custody after over thirty years of confinement, on a life sentence, and is not entitled to receive a new trial. The plea bargain-

ing process was valid and legal. The acceptance of the voluntary guilty plea by the trial court accorded the Respondent all of the constitutional requirements of due process,

In order to fulfill the requirements of due process of law and accord an accused every fairness which is properly his upon trial, the accused must be informed by the Court or his counsel of the consequences of his plea of guilty either before such a plea is accepted by the trial court or before sentence is rendered.

The Respondent was accorded due process of law at the time he offered his plea of guilty, without any inquiry by the trial judge, because he had been advised of the consequences of his plea by his retained counsel. He knew that the sentence was set at life, without any discretion on the part of the Court.

The Respondent was properly, effectively and ably represented by counsel, there is no question but that the Respondent understood the consequence of his plea, and the plea was not a result of coercion. The Court had found that the plea was voluntary.

The guilty plea of the Respondent was free and voluntary and should not be set aside. If Bailey's rationale is adopted then all guilty pleas would be vitiated if they were entered as a result of a bargain with the prosecution. The circumstances of this case show that Bailey's guilty plea was a voluntary decision. The evidence shows that the trial court heard the matter at some length, found that Bailey was in fact guilty, that at the time of his plea he was fully accurately advised, and that his plea was voluntary. Bailey's guilty plea was entered in open court freely, voluntarily and with full advice of counsel and the Court. Bailey's plea of guilty was not a compromise with justice. Through his attorney he was acting knowingly and in-

telligently, and the ultimate decision to plead guilty was neither the product of deception nor coercion. The opinion of the Fourth Circuit should be reversed and the order of the District Court, and the opinion of the S. C. Supreme Court, should be affirmed.

SUMMARY

The record of this case clearly shows no violation of due process in any areas of the proceedings. The accused was represented by counsel. The Respondent received due process and the fundamental fairness required in the administration of criminal justice. The State Solicitor did not conceal any evidence, favorable or unfavorable to the Respondent. Defense counsel could and did adequately and effectively represent the Respondent. There was no deficiency in the State's case. Defense counsel knew the true situation. The State Solicitor knew that a witness was reluctant to testify, however, the State could and would have gone to trial without that witness if the necessity had arisen

The State Solicitor fulfilled his duty to justice and the State when he bargained for the guilty plea. He was reluctant to go to trial but he could have obtained a conviction. The State Solicitor has never, and is not now, required to inform the Court of the quality of the evidence available to him, provided the evidence is valid and legal.

The Court fulfilled its judicial duty in accepting a plea of guilty to the capital offense by satisfying itself that the plea was made freely and voluntarily with full knowledge of the consequences. The plea of not guilty at the arraignment was routine. The court satisfied itself, through the Solicitor, defense counsel and jury verdict that the guilty plea was voluntary. The Court has never required, and does not now require, the prosecution to present the

State's evidence for judicial consideration before accepting the plea. Had the Court questioned the Respondent it would have discovered that the Respondent honestly believed the written agreement with the prosecutor was not a guarantee of freedom within ten years or less, that he was not improperly influenced in his plea by the very fact of this agreement and that there was only the possibility of a parole after the service of ten years.

The Respondent received a criminal trial with the full observance of all the due process requirements of such a trial. He is not entitled to an absolute release from custody after over thirty years of confinement, on a life sentence, and is not entitled to receive a new trial.

CONCLUSION

There was no State suppression of evidence from a criminal defendant and his counsel. The plea bargaining process was valid and legal. The acceptance of the voluntary guilty plea by the trial court accorded the Respondent all of the constitutional requirements of due process.

In order to fulfill the requirements of due process of law and accord an accused every fairness which is properly his upon trial, the accused must be informed by the Court or his counsel of the consequences of his plea of guilty either before such a plea is accepted by the trial court or before sentence is rendered.

The Respondent was accorded due process of law at the time he offered his plea of guilty, without any inquiry by the trial judge, because he had been advised of the consequences of his plea by his retained counsel. He knew that the sentence was set at life, without any discretion on the part of the Court.

The Respondent was properly, effectively and ably represented by counsel, there is no question but that the

Respondent understood the consequence of his plea, and the plea was not a result of coercion. Since the Court had found that the plea was voluntary, and in the absence of any showing of prejudice to the Respondent, the Respondent had waived all but jurisdictional defects.

The guilty plea of the Respondent was free and voluntary and should not be set aside. If Bailey's rationale is adopted then all guilty pleas would be vitiated if they were entered as a result of a bargain with the prosecution. The circumstances of this case show that the inducement for Bailey's guilty plea was not one which overcame his ability to make a voluntary decision. The evidence shows that the trial court heard the matter at some length, found that Bailey was in fact guilty, that at the time of his plea he was fully and accurately advised, and that his plea was voluntary. Bailey's guilty plea was entered in open court freely, voluntarily and with full advice of counsel and the Court. Bailey's plea of guilty was not a compromise with justice. Through his attorney he was acting knowingly and intelligently, and the ultimate decision to plead guilty was neither the product of deception nor coercion. The opinion of the Fourth Circuit should be reversed and the order of the District Court, and the opinion of the S. C. Supreme Court, should be affirmed.

Therefore, it is respectfully submitted that this Court should exercise its jurisdiction in granting the writ of *certiorari* to review the decision of the United States Court of Appeals for the Fourth Circuit in this case so that the conflict in the decision rendered by the Fourth Circuit Court of Appeals and the decisions rendered by the Supreme Court of the State of South Carolina, and the conflict with the decisions from the various Circuit Courts of

Appeal and the U. S Supreme Court on the question presented here, may be settled.

Respectfully submitted,

DANIEL R. McLEOD,
Attorney General,
Columbia, S. C.,

EDWARD B. LATIMER,
Assistant Attorney General,
Columbia, S. C.,
Counsel for Petitioners.

INDEX TO APPENDIX

PAGE

A. Opinion, Supreme Court of South Carolina 53

B. Petition for Rehearing 65

C. Order Denying Rehearing 68

D. Order, Supreme Court of the United States, Certiorari Denied 69

E. Opinion, United States District Court of South Carolina 70

F. Opinion, U. S. Court of Appeals, Fourth Circuit ... 79

G. Order, U. S. Court of Appeals, Fourth Circuit 88

APPENDIX A

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RAY S. BAILEY, RESPONDENT,

versus

ELLIS MACDOUGALL, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS FOR THE STATE OF SOUTH CAROLINA, APPELLANT

Appeal from Richland County

JOHN GRIMBALL, JUDGE

Opinion No. 18420
Filed November 10, 1965

REVERSED

Attorney General Daniel R. McLeod and Assistant Attorney General Edward B. Latimer, both of Columbia; and Solicitor B. O. Thomason, Jr., of Greenville, for appellant.

Mrs. Betty McBride Sloan, of Columbia, for respondent.

Moss, A. J.: This record shows that on May 1, 1932, A. B. Hunt, a police officer of the City of Greenville, South Carolina, was shot and killed on a well lighted street in said city while he was attempting to prevent a robbery. Thereafter, on May 5, 1932, a warrant was issued by a Magistrate of Greenville County charging Ray Bailey, the respondent herein, with the murder of said Hunt. The Governor of South Carolina duly made requisition upon the Governor of North Carolina and, on May 9, 1932, the Governor of North Carolina duly issued a warrant of extradition requiring the arrest of Bailey. He was arrested on June 7, 1932, and thereafter applied to the Superior Court of Jackson County, North Carolina, for a Writ of *Habeas Corpus* alleging the illegality of custody in that he was charged with the murder of A. B. Hunt on May 1, 1932,

when, at which time he was in the State of North Carolina and was not in the State of South Carolina. A return to the writ was duly made asserting that Bailey was lawfully in custody upon the aforesaid warrant. The case came on to be heard before a Judge of the Superior Court of North Carolina and, after hearing numerous witnesses and receiving a number of affidavits, the trial judge found that Bailey was not a fugitive from justice from the State of South Carolina and was not present at the time of the commission of the alleged crime at Greenville, South Carolina, and directed his release from custody. From the aforesaid judgment, an appeal was taken on behalf of the State of South Carolina to the Supreme Court of North Carolina and a writ of certiorari issued to bring up the record. The judgment of the lower Court was affirmed. *Ex Parte Bailey,* 203 N. C. 362, 166 S. E. 165.

The State of South Carolina applied to and was granted by the Supreme Court of the United States a writ of certiorari to review the judgment of the Supreme Court of North Carolina, which affirmed the judgment of the Superior Court of Jackson County, North Carolina. The United States Supreme Court reversed the judgment of the Supreme Court of North Carolina which had affirmed the lower Court, holding that one whose extradition is sought cannot be released from custody on *habeas corpus* unless his absence from the demanding State, when the alleged offense was committed, is established beyond reasonable doubt; and this requirement is not met where there is merely a conflict of evidence. The cause was remanded to the Supreme Court of North Carolina for further proceedings. *South Carolina v. Bailey,* 289 U. S. 412, 53 S. Ct. 667, 77 L. Ed. 1292.

Thereafter, in 1935, Bailey was arrested in Gainesville, Georgia, and brought to Greenville, South Carolina, for trial upon an indictment charging him with the murder of A. B. Hunt; the said indictment having been returned by the Grand Jury of Greenville County on August 25, 1932.

The record shows that Bailey employed an outstanding, capable and experienced lawyer of the Greenville Bar to represent him. This attorney is of the highest integrity

and honesty and always gives a client his complete loyalty and serves him in good faith to the best of his ability.

The case against the respondent was called for trial in the General Sessions Court for Greenville County on January 13, 1936. Upon his arraignment, the respondent entered a plea of not guilty. Thereafter, the Solicitor and the retained counsel of the respondent entered into negotiations concerning a possible guilty plea. Pursuant thereto it was agreed that the respondent would withdraw his plea of not guilty and enter a plea of guilty of murder with recommendation to the mercy of the Court. A jury was impaneled and the agreement which had been reached was carried into effect by the verdict of said jury. The respondent was sentenced to imprisonment in the State Penitentiary for the term of his whole lifetime.

It appears from the record that during the negotiations concerning a possible guilty plea that the Solicitor and the Chief of Police of the City of Greenville signed a statement, dated January 13, 1936, and such was delivered to counsel for the respondent, reading as follows:

> "This will confirm our conversation that in the event that Ray Bailey enters a plea of guilty with recommendation to mercy in the case now pending against him in the General Sessions Court for Greenville County, that I will, knowing the facts of the case and the circumstances surrounding same, after the said Ray Bailey has served for a period not exceeding ten years, recommend to the Board of Pardons or Governor a pardon or parole."

The respondent with the aid of retained counsel, other than his original counsel, on May 4, 1964, petitioned the Court of Common Pleas for Richland County for a Writ of *Habeas Corpus*, alleging that his detention and restraint under the aforesaid sentence was unlawful and in violation of his constitutional rights under both the State and Federal Constitutions, asserting (a) denial of due process of law; (b) that his guilty plea was induced by the written promise and agreement hereinbefore set forth, that if he would plead guilty he would only serve ten years and possibly less, and would be aided in securing a parole; (c)

that being only twenty-five years of age, with no previous record and no experience with the law, signed the agreement believing and being led to believe that the State was bound by the aforesaid agreement; and (d) that the voluntary nature of his guilty plea was destroyed by the acts herein recited, thereby depriving him of his rights guaranteed by Art. I, Sec. 5 and Sec. 18 of the 1895 Constitution of this State, and of the Fifth and Fourteenth Amendments to the Constitution of the United States. The State, by way of return to the aforesaid petition, alleged that the respondent was confined in the South Carolina State Penitentiary pursuant to a sentence of life imprisonment imposed upon him on January 13, 1936, in the Court of General Sessions for Greenville County, South Carolina, which followed a plea of guilty to the charge of murder with recommendation to the mercy of the Court. The other allegations of the petition were denied.

A full hearing on the issue made by the respondent's petition and the return of the State was had before the Honorable John Grimball, Resident Judge of the Fifth Judicial Circuit. Thereafter, by order of July 29, 1964, Judge Grimball set aside the guilty plea and the sentence imposed pursuant thereto on the grounds that the respondent's guilty plea was induced by the agreement heretofore set out, that he understood that he would only serve ten years and possibly less, that the Solicitor would aid in his parole, that he was led to believe that the State was bound by the Solicitor's actions, and that these acts destroyed the voluntary nature of the guilty plea. The trial Judge further held that the respondent was not entitled to his absolute release and remanded this case to the General Sessions Court for a new trial. He permitted the respondent to be released from custody provided he posted a bond in the amount of Ten Thousand Dollars, to be approved by the Clerk of the Court of Greenville County. The State has appealed from the aforesaid order.

The issue here is whether the agreement by the Solicitor and the Chief of Police to recommend to the Board of Pardons or Governor a pardon or parole after the re-

spondent had served for a period of not exceeding ten years destroyed the voluntary nature of his guilty plea.

The person seeking relief by a Writ of *Habeas Corpus* has the burden of sustaining the allegations of his petition by a preponderance of the evidence. *Shelton v. State,* 239 S. C. 535, 123 S. E. (2d) 867; *Moore v. State,* 241 S. C. 279, 128 S. E. (2d) 109.

The respondent testified that he was not guilty of the crime charged against him in the indictment and that he wasn't in Greenville, South Carolina, at the time the alleged crime was committed. The question of the guilt or innocence of the respondent is not an issue in a *habeas corpus* proceeding. *Medlock v. Spearman,* 185 S. C. 296, 194 S. E. 21; *Wyatt v. State,* 243 S. C. 201, 133 S. E. (2d) 120, and *Tillman v. State,* 244 S. C. 259, 136 S. E. (2d) 300. Likewise, *habeas corpus* is not the proper proceeding to try the question of alibi. 39 C. J. S., *Habeas Corpus,* Sec. 22, page 473.

A plea of guilty is a confession of guilt made in a formal manner and is equivalent to and as binding as a conviction after a trial on the merits. It has the same effect in law as a verdict of guilty and authorizes the imposition of the punishment prescribed by law. A plea of guilty must be freely and understandingly made. A plea of guilty, if induced by promises which deprive it of the character of a voluntary act, is void and should be set aside.

We come now to consider whether the respondent voluntarily and understandingly entered a plea of guilty to murder with a recommendation to the mercy of the Court or whether his plea was induced by promises which destroyed the voluntary character of such.

It is admitted that the respondent never had any conversation with the Solicitor or any law enforcement officer concerning the entry of his plea. According to the record before us, the only persons who discussed this matter with the respondent were his brother, C. M. Bailey, and his employed attorney. This attorney was called by the respondent as a witness. He testified that he was employed by C. M. Bailey, a brother, to represent the respondent. This attorney testified that in the preparation of the defense of the respondent, he reviewed all of the circum-

stances in the case as best as he knew how and realized that under the facts it would be very difficult to defend the case successfully. The record is not entirely clear as to whether counsel for the respondent or the Solicitor initiated negotiations looking toward the taking of a plea. He says that he endeavored to procure from the Solicitor and the Chief of Police an agreement to accept a plea of guilty to a charge of manslaughter rather than murder, in which effort he was unsuccessful. He said the Solicitor finally agreed that if the respondent would enter a plea of guilty to murder with a recommendation to mercy that he and the Chief of Police would recommend a pardon or parole after the respondent had served ten years. This attorney then testified as follows:

> "After they agreed that they would make that recommendation, I talked to Mr. Bailey's brother, and I went down to the jail and talked to Mr. Bailey and his brother together, and I told them just exactly what the proposition was and what the circumstances were, and we discussed the case as a lawyer does with his client. Mr. Bailey had never admitted, and has not to this day, to me admitted directly that he was there or that he killed the officer. But I remember stating to Mr. Bailey and his brother the proposition that was to be considered, and I said 'Mr. Bailey, if you were not there and did not participate in that shooting, I would advise you under no circumstances to enter any plea of guilty of any kind'—I said, 'You are the only person who knows whether you were there or not,' and I said, 'You and your brother can discuss this matter and come to a conclusion about it. If you were there and participated in it, you can consider whether or not you would agree to this plea.'"

We quote further from this attorney's testimony:

> "• • • Of course, we discussed the evidence that was against him, and at any rate, I told him to consider this matter, and I also told Mr. Bailey and his brother that this recommendation did not mean that the Governor would have to grant the parole or the pardon, but I did state to him that, ordinarily, the Governor

would give great weight to the recommendation of the prosecuting officer and to the Chief of Police in this case. So, after discussing it with them, I left and told them to talk about it and let me know the next day their conclusion. So I went back down to the jail, according to my recollection, and Mr. Bailey and his brother, Mr. C. M. Bailey—I think that was his name—said they thought they would agree to enter the plea. Out of an abundance of precaution, I went back to the Solicitor, Your Honor, and the Chief of Police, and told them that they would have to put that agreement in writing; that it was a very serious matter; and that, if they would write me a letter stating that they would recommend a parole or pardon of Mr. Bailey after he had served a term of ten years or before—I forget just how it was, but you have the letter before you—that he would enter the plea. So the plea was entered under those circumstances. The letter was signed and I took it down to Mr. Bailey and let him read it, or read it to him. At least, I showed them the letter and had the agreement confirmed in that way."

This attorney was further asked by the present attorney for the respondent whether or not he felt that "this agreement itself was tantamount to the promise that this man would serve only ten years." The answer to this question was:

"Well, no, ma'am, I couldn't answer that affirmatively, because I told Mr. Bailey at the time that this letter did not mean that the Governor would have to grant the parole or the pardon, but I did tell him that the recommendation of those two officers, ordinarily, would have great weight with the Governor or anyone who passed upon that question."

This witness was asked on cross examination as to the legality of the agreement made by the Solicitor and the Chief of Police. His answer was:

"* * * the legality of this agreement is not in question. The agreement was that these two officers would recommend a parole or a pardon for this boy after service of ten years, and I don't know what you mean

by 'legality', but that was an agreement between the two officers and the prisoner that they would do that. Now, they carried that out. They recommended that he be paroled or pardoned. They carried out the agreement. Now, as to the legality of it, I don't understand what you mean."

We quote further from the testimony of this witness:

"Q. Well, to clarify that, there was actually no coercion exerted on the part of the Solicitor against Ray Bailey, was there?

"A. Not a bit that I know of.

"Q. And any recommendations or conversations that were had concerning this agreement were made by you to Mr. Bailey, were they not?

"A. That's right.

"Q. The conversations were between you and Ray Bailey and his brother, C. M. Bailey?

"A. That's my recollection.

"Q. And the final agreement to take, or to agree to this plea of guilty to murder with recommendation to the mercy of the Court, was Ray Bailey's decision and Ray Bailey's alone, was it not?

"A. Yes, sir. He made the decision and instructed me what to do."

This witness, in several other places in his testimony, said there was no coercion or intimidation on his part to convince the respondent that he should make this guilty plea. He further said that he explained to the respondent that the agreement made by the Solicitor and the Chief of Police would only be a recommendation to the Governor and that it would be up to the Governor as to whether or not he would accept this recommendation and act on it; that he would not be bound to do so.

The Solicitor, who prosecuted this case in behalf of the State, was called as a witness by the respondent. He testified that it was his recollection that he approached counsel for the respondent with a view to having the respondent enter a plea of guilty in this case. He said that after negotiations that the respondent's attorney came back to him and said he wouldn't permit the respondent to plead un-

less the Solicitor and Chief of Police would sign a letter that after the service of not more than ten years that "we would recommend that he be paroled or pardoned." The Solicitor said it was finally agreed that respondent would enter a plea of guilty with recommendation of mercy with the consent and approval of the State, and he confirms the signing by him and the Chief of Police of the letter hereinbefore quoted, that they would recommend to the Board of Pardons or Governor a pardon or parole after the respondent had served for a period not exceeding ten years. He further testified that when the respondent made application for a pardon or parole that he and the Chief of Police recommended that such be granted. The Solicitor testified that he never talked to the respondent or with any member of his family. He said that the only negotiations that he had in connection with this case were through the employed attorney of the respondent.

Ray Bailey testified in his own behalf and admitted that he escaped from custody in 1950 and went to North Carolina and voluntarily surrendered within a few days thereafter and was returned to prison. He testified that he again escaped in 1957 and was at large for approximately seven years when he was recaptured in the State of Montana and returned to prison.

The respondent testified that he agreed to take a life sentence with the understanding that he would get out in ten years or less. He said "That's the way it was explained to me." Upon cross examination, when asked if his attorney did not come to the Greenville County Jail with his brother and "told you that he had worked out a proposition concerning a consent verdict," his answer was that he didn't remember what his lawyer said but "I remember he said he had it fixed for me to take a life sentence. That's all I remember." When asked if the Solicitor or any of his assistants ever in any way tried to coerce him into entering a plea of guilty or a consent verdict, said "I don't remember talking to them, so they couldn't." He admitted that he had seen a copy of the letter which the Solicitor and the Chief of Police signed stating that they would agree to recommend either a pa-

role or a pardon after he had served a maximum sentence of ten years. He admitted that the Solicitor and the Chief of Police "kept their word" and recommended a pardon or parole for him after he had served ten years. When pressed for an answer as to who told him that if he would take a life sentence that he would get out in ten years or less, he said that his brother, C. M. Bailey, was the one who made this representation to him.

The respondent called as his witness the Director of the South Carolina Pardon and Parole Board. This witness testified that the application of the respondent for a parole came before his Board. In passing upon such application, the Board considered the recommendation of the Solicitor and the Chief of Police who had on several occasions recommended the respondent for parole. This witness further testified that the prison record and his escapes hurt the respondent more than anything else.

It has been held that allegations in a petition for a Writ of *Habeas Corpus* that the petitioner is held without due process of law must be specific in statement of facts supporting the legal conclusion. *Kohl v. Lehlback,* 160 U. S. 293, 16 S. Ct. 304, 40 L. Ed. 432; *Whitten v. Tomlinson,* 160 U. S. 231, 16 S. Ct. 297, 40 L. Ed. 406, and *Ex Parte Anderson,* 191 Or. 409, 229 P. (2d) 633, 230 P. (2) 770, 29 A. L. R. (2d) 1051.

A *habeas corpus* case is tried and determined on the issues framed by the pleadings. The proof must correspond with, and be confined to, the issues raised by the pleadings. A material variance between the pleadings and the proof is fatal. 39 C. J. S., *Habeas Corpus,* Sec. 97(a) and (b), page 661.

We recur to the petition herein in which it is alleged that the respondent's detention and restraint is unlawful and unconstitutional in that he was denied due process of law because:

> "Petitioner's guilty plea was induced by the written promise and agreement dated January 13, 1936, of * * *, then Solicitor of the Thirteenth Judicial Circuit, and * * *, then Chief of Police of the City of Greenville, that if he would plead guilty as charged he would

only serve ten years and possibly less, and they would aid in his parole, a copy of said agreement being attached hereto."

The petition of the respondent is specific in that it is alleged that the guilty plea was induced by the written promise and agreement of the Solicitor and the Chief of Police of the City of Greenville, that if he would plead guilty he would only serve ten years and possibly less. There is no proof of this fact in the record. The promise and agreement, a copy of which said agreement was attached to the respondent's petition, is to the contrary. The written promise made by the Solicitor and the Chief of Police is definite, clear, explicit and unambiguous. The only promise made in such letter was that if the respondent entered a plea of guilty to murder with a recommendation to mercy that these officers would "after the said Ray Bailey has served for a period of not exceeding ten years, recommend to the Board of Pardons or Governor a pardon or parole." It is stipulated that the Solicitor never conferred with the respondent and that the written promise and agreement was explained to him by his employed counsel.

A study of the entire record in this case leads us to the conclusion that the respondent has failed to prove by a preponderance of the evidence that he was misled, deceived or overreached in any way. There is nothing to show that the plea was induced by coercion, false promises or misrepresentations. The respondent's plea of guilty was freely, voluntarily and understandingly made after full consultation with his brother and his employed counsel. The record is entirely free of any evidence that the plea of guilty entered by the respondent was induced or in way influenced by any improper act or advice of his counsel but was entered after full disclosure to him by his counsel of its nature and possible consequences. There is a total absence of any proof that any one connected with the State, or even the respondent's own counsel, did or said anything which destroyed the voluntary character of his plea of guilty.

It is our conclusion, under all the facts and circumstances as revealed by the record in this case, that the re-

spondent was not deprived of any rights guaranteed to him under the Constitution of the United States or of this State. We further conclude that the finding by the lower Court that respondent's plea of guilty was not voluntarily made, is erroneous and should be set aside.

The judgment of the lower Court is reversed. The writ of *Habeas Corpus* is discharged and the respondent is remanded to custody for the service of the sentence imposed upon him by the Court of General Sessions for Greenville County.

Reversed and remanded.

TAYLOR, C. J., LEWIS, BUSSEY and BRAILSFORD, JJ., concur.

APPENDIX B

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County

FIFTH JUDICIAL CIRCUIT

RAY S. BAILEY, RESPONDENT,

versus

ELLIS MacDOUGALL, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS FOR THE STATE OF SOUTH CAROLINA, APPELLANT

Petition for Rehearing

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA:

An opinion of this Court in the above entitled matter was filed on the 10th day of November, 1965, reversing the judgment of the Court of Common Pleas of Richland County, and the Respondent, Ray S. Bailey, by his Attorney, Betty M. Sloan, respectfully requests a rehearing for the reasons and on the grounds hereinafter stated:

The Court's opinion is manifestly based primarily upon the facts that the Respondent was represented by counsel of his choice who served him in good faith and to the best of his ability, and that the Solicitor dealt with the attorney in presenting the agreement and not the Respondent personally, and that the attorney presented the proposition of the guilty plea.

We respectfully submit that the record is quite clear as to the following facts which should be considered by this Court.

Mr. J. G. Leatherwood, the Solicitor for the Thirteenth Judicial Circuit at the time in question, testified that at the time of the attempted arrest by the Greenville County officers, on the night in question, they had no legal process or warrants and there was no outward violation of any law by the persons involved that could be seen by the officers. (T. R., p. 84.)

That it was never definitely shown who fired the first shots, the officers or the defendants. (T. R., p. 85.)

That the only witness for the State was unavailable and as stated in the Record at page 86,

"Q. Now, with whom did you talk it over, Mr. Leatherwood?

A. The Chief of Police and Tom Wofford. And we felt that if we didn't get Coren's testimony that there was some possibility of failing to get any kind of a conviction due to other legal matters which would arise during the trial. The public probably didn't understand this phase of it. But we knew it would come up whether or not there were any warrants and the right to arrest him and further that he had a great number of witnesses who would testify that at the time testimony. I don't know about Singleton; I'm not positive about that. But we felt like he was going to escape us if we didn't do something and I'm satisfied that we agreed among ourselves that if we would get him to plead guilty with a recommendation of mercy it would be to the best interest of the State."

That based upon his personal evaluation of the State's case against the Defendant, the Solicitor approached the attorney for Ray Bailey with the proposition for a guilty plea. (T. R., p. 87.)

That the Defendant's attorney was not told the full facts of the unavailability of the State's witness, which would have immediately made the weakness of the State's position apparent to an attorney of Mr. Wyche's ability, and greatly influence his advice to his client as quoted in the opinion and from the record he "told them just exactly the proposition was and what the circumstances were, and we discussed the case as a lawyer does with his client."

That lacking the full disclosure of the facts, his evaluation of his client's position was necessarily based on his own doubts about being able to successfully defend the case. (T. R., p. 15.)

It is a well settled principle that the duty of the Solicitor is not only to prosecute, but to see that justice is done.

On this premise is founded the broad discretionary powers delegated to the office of the Solicitor.

It was the duty of the Solicitor to advise the attorney for the Defendant of the unavailability of the State's witness, when asking him to approach his client with the proposition of the promise to recommend parole after ten years in exchange for the guilty plea.

To extract from Ray Bailey, through his attorney, a plea of guilty without full disclosure of all the facts to his attorney, and thus to him, in exchange for a written promise to do anything in mitigation of the statutory sentence without the knowledge or consent of the Court, and to the bargain for the plea, while knowing full well that the promise implied in the agreement was not binding, but that the State could not prove the guilt of Ray Bailey beyond a reasonable doubt; these acts constitute a fraud upon the Court and a travesty of justice.

A plea of guilty so obtained is not freely and understandingly made where full disclosure of the material facts, which influence the decision to plead, is not made to the Defendant or to his attorney, and where the plea is induced by promises which deprive it of the character of a voluntary act, such a plea is void and should be set aside.

Respectfully submitted,

BETTY M. SLOAN,
Attorney for Respondent.

Columbia, South Carolina,
November 18, 1965.

Certified True Copy

Francis H. Smith,
Clerk, S. C. Supreme Court.

APPENDIX C

December 14, 1965

Mrs. Betty McBride Sloan
1316 Washington Street
Columbia, South Carolina

Re: *Bailey v. MacDougall*, Director

Dear Mrs. Sloan:

The Court has this day refused your petition for rehearing in the above case in the following order:

"Petition denied.

/s/ C. A. TAYLOR, C. J.,
/s/ JOSEPH R. MOSS, A. J.,
/s/ J. WOODROW LEWIS, A. J.,
/s/ THOS. P. BUSSEY, A. J.,
/s/ J. M. BRAILSFORD, A. J."

The remittitur is being sent down today.

Very truly yours,

FRANCES H. SMITH,
Clerk.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. 1217, OCTOBER TERM, 1965

RAY S. BAILEY, PETITIONER,

versus

ELLIS MacDOUGALL, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS FOR SOUTH CAROLINA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

On Consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of South Carolina,

It Is Ordered by this Court that the said petition be, and the same is hereby, denied.

May 31, 1966

A true copy JOHN F. DAVIS
Test:
Clerk of the Supreme Court of the United States
BY E. S. SULLIVAN
Chief Deputy

APPENDIX E

ORDER

Civil Action No. 67-217

Petitioner, presently confined in the South Carolina State Penitentiary, prays for a Writ of *Habeas Corpus* of this court upon the grounds that:

> The conviction and sentence pursuant to which Petitioner is being detained was imposed in violation of the 5th and 14th Amendments to the Constitution of the United States and Article 1, Sections 17 and 18 of the Constitution of South Carolina in that his plea of guilty was involuntary being the result of an agreement which was reduced to writing and signed, negotiated between the Solicitor for the Thirteenth Judicial Circuit, the Chief of Police and the Attorney for the Petitioner, without disclosure to the Court, wherein the Petitioner was promised that if he would plead guilty to the indictment of murder with recommendation to the mercy of the Court, that he would be given a life sentence and that after the Petitioner had served a period not exceeding ten (10) years, the Solicitor and Chief of Police would recommend a pardon or parole and at that time such recommendation was tantamount to parole and although Petitioner has been under sentence for a period of thirty-one (31) years, the State has consistently refused to be bound by the promise of the Solicitor and no pardon or parole has been forthcoming.

This court has examined carefully the entire record and for a statement of the proceedings adopts the statement of petitioner contained in "The Petition for a Writ of Certiorari to the South Carolina Supreme Court," which was presented in the Supreme Court of the United States in the October 1965 term. The United States Supreme Court refused to issue a Writ of Certiorari by Order dated May 31, 1966.

Petitioner, Ray S. Bailey, was indicted August 25, 1932, on a charge of murder in the Greenville County

Court of General Sessions and tried in January, 1936, having been extradicted to the State of South Carolina from the State of North Carolina pursuant to the decision of [the court] in *State of South Carolina v. Ray Bailey,* 289 U. S. 412 (1933). Petitioner changed his plea to guilty of murder with recommendation to the mercy of the Court, following the negotiation of an agreement, which was reduced to writing between the then prosecutor, the Chief of Police and petitioner's attorney, the agreement being that the prosecutor and Chief of Police would recommend a pardon or parole after the petitioner had served a period not exceeding ten years. Neither the fact nor the contents of the agreement was disclosed to the Court, and the petitioner was sentenced to be confined for a term of his whole natural life.

On May 4, 1964, the petitioner, through counsel, filed a petition for a Writ of *Habeas Corpus* in the Court of Common Pleas for Richland County, alleging that his restraint under the above sentence was unlawful and in violation of his constitutional rights under both the State and Federal Constitutions, asserting among other things a denial of due process of law and that his guilty plea was induced by a promise that he would serve only ten years or possibly less of the sentence. The Honorable John Grimball, Judge Fifth Judicial Circuit, issued the Writ of *Habeas Corpus,* and hearings were held.

Defense counsel for petitioner at the time of his trial and the prosecutor, Mr. J. G. Leatherwood, solicitor for the Thirteenth Judicial Circuit in 1936, offered testimony in the *habeas corpus* proceeding stating that they entered into negotiation concerning a possible guilty plea, that the prosecutor did not personally confer with the petitioner, and that the written agreement was presented to him by his attorney.

The prosecutor testified that he initiated the negotiations to get the petitioner to plead guilty because the irregularities in the attempted arrest, coupled with the refusal of the principal witness for the State to

testify, made the possibility of getting conviction extremely remote. He further testified that the facts of the deficiency of the State's case were not known to petitioner's attorney during the negotiations for the plea, or to the Court at the time the plea was entered.

By Order of July 29, 1964, Judge Grimball set aside the guilty plea and sentence on the grounds that it was induced by the promise with respect to the sentence, and remanded the case to Greenville County for a new trial. The petitioner was released from custody after posting bond. The State appealed to the Supreme Court of South Carolina.

The Supreme Court of South Carolina reversed and remanded, discharging the Writ of *Habeas Corpus* on November 10, 1965, ... S. C. ...., 145 S. E. (2d) 425 (1965). Petition for rehearing was filed on November 18, 1965, to focus the attention of the Court on the question of non-disclosure by the prosecutor, but rehearing was denied without opinion on December 14, 1965.[1]

This court has read the entire transcript of record before the South Carolina Court of Common Pleas which was later printed and filed in the Supreme Court of South Carolina upon the appeal from the decision of the Court of Common Pleas. The facts with which those proceedings were involved were as follows:

C. Granville Wyche, Esquire, an outstanding attorney of the Greenville Bar, was employed by C. M. Bailey, brother of petitioner, to defend petitioner on the charge of murder. He testified that public sentiment about the case was very strong because the policeman who had been shot was very popular and was a man of considerable standing in the community. The policeman named Hunt, was shot in Greenville, but petitioner originally claimed to Attorney Wyche that he, petitioner, was not in Greenville on the night in question, but that he received his wounds from a shooting that occurred in Madison County, North Carolina. Attorney Wyche explained before Judge Grimball that he

[1] This is the identical language used in the Petition for the Writ of Certiorari, except for omission of references to the transcript.

thought the case would be a difficult one to defend and that a witness named Singleton, who was a city officer of the City of Greenville, would testify that defendant Bailey was in Greenville on the night of the shooting. Wyche then discussed with Greenville Chief of Police Smith and the then Thirteenth Judicial Circuit Solicitor the possibility of pleading petitioner guilty to manslaughter. The solicitor informed Attorney Wyche that the State of South Carolina would not accept a plea of manslaughter but that it would accept a plea of "guilty with recommendation to the mercy of the court," which calls for a mandatory sentence of life imprisonment. Wyche agreed to recommend such a plea to the petitioner if the Chief of Police and the solicitor would recommend a pardon or parole after the petitioner had served ten years. Wyche then went with the petitioner's brother who had hired him to the jail and discussed it with petitioner. Petitioner insisted that he was innocent. Wyche testified that he told the petitioner that if he was not guilty, under no circumstances should he enter a plea of guilty, He then went back to Solicitor Leatherwood and told him to put in writing the statement about recommending parole. Leatherwood and Smith did so and the writing was as follows:

> "This will confirm our conversation that in the event that Ray Bailey enters a plea of guilty with recommendation to mercy in the case now pending against him in the General Sessions Court for Greenville County, that I will, knowing the facts of the case and the circumstances surrounding same, after the said Ray Bailey has served for a period not exceeding ten years, recommend to the Board of Pardons or Governor a pardon or parole.

This communication was later read to petitioner. Petitioner then appeared before the court. A jury was empaneled, and he plead guilty. He was found guilty of murder with recommendation to mercy.[2]

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[2] In South Carolina a defendant cannot plead guilty to the crime of murder before the judge. He can agree to enter a plea before an empaneled jury, and the jury, pursuant to the plea, entered a verdict of "guilty of murder, with the recommendation of mercy of the court."

The Honorable A. L. Gason, then presiding Judge of the Greenville County Court of General Sessions, sentenced petitioner to be confined for the time of his whole natural life. After the plea was taken, Attorney Wyche put the letter in his safety deposit box. He was leaving for military service and he placed the notation on the letter that it was to be delivered to the petitioner if anything should happen. When Wyche returned from the war, he took the matter up with the Governor of South Carolina, the Honorable Ransome Williams. Smith and Leatherwood participated with him in asking the Governor to pardon the petitioner.[3] Governor Williams turned down their plea. J. Strom Thurmond, Governor of South Carolina from 1947 to 1951, was also contacted. However, he was pledged to the rule that no pardon or parole could be given a life prisoner until he had served 12 years. At the time the petitioner had not served 12 years. Attorney Wyche went back to Thurmond a second time and was refused. Then Attorney Wyche and others brought the matter up before the South Carolina Pardon and Parole Board. Upon cross examination, Attorney Wyche stated that all three, Smith, Wyche and Leatherwood, wrote strong letters to the Parole Board. The two officers carried out their promise. Wyche was explicit in that fact that "no coercion was exterted on the part of Solicitor Leatherwood against Ray Bailey" and "there were absolutely no other promises—as far as I know."

Attorney Thomas Wofford of Greenville testified that he was assistant to Solicitor Leatherwood at the time of the guilty plea. He had made, he said, an exhaustive investigation into the case and found that a principal witness by the name of Corea had been sent to federal prison. When Corea was contacted in Atlanta he stated that he, Corea, would not testify against petitioner unless he was promised a federal parole. As this was impossible, the solicitor's office abandoned the idea of using Corea. The fact that Corea was not available was never communicated to Wyche or the petitioner by the solicitor. The letter of Chief Smith and

[3] At the time the Governor of South Carolina had the right to pardon or parole without consent of the South Carolina Pardon and Parole Board.

Solicitor Leatherwood was never communicated to Judge Gaston.

Petitioner was allowed to testify, apparently in full. He told of his escape, of the fact that he stayed in North Carolina three years before going to Montana in 1960. His statement was "I agreed to take a life sentence, with the understanding that I would get out in ten years or less." He stated that his brother was a go-between between Attorney Wyche and petitioner. The late Governor Hoey was his North Carolina lawyer. He stated he was not coerced by either Leatherwood or Wofford, but that his brother told him that if he didn't plead that they were going to try some other people for the crime. He testified that as far as he knew Solicitor Leatherwood and Chief Smith kept their word. He maintains that he was innocent.

Another witness was Honorable J. C. Todd, Director of the Pardon and Parole Board, who testified that he was aware of the agreement involved and that the Board considered the agreement "at the time he first came up." He stated that the solicitor had the power to recommend a parole but that neither the solicitor nor the Governor nor any other official can bind the State Pardon and Parole Board.

The deposition of the late J. G. Leatherwood, which was originally taken July 10, 1964 because of Leatherwood's declining health sheds no significant light on the facts. He affirmed that he entered into the agreement, committed it to writing, and handed it to Wyche. Leatherwood never talked to petitioner at any time. He did carry out his agreement and apparently, he went to great lengths to honor his pledge not only to recommend the parole but to follow it up with additional effort.

Other testimony was offered and received.

Judge Grimball, the State Judge hearing the petition for *habeas corpus*, refused to grant petitioner's motion for an absolute release but set petitioner's plea of guilty aside and ordered him returned to Greenville County for further proceedings. The State of South Carolina appealed, and the Supreme Court of South Carolina, by opinion dated No-

vember 10, 1965, reversed the lower court in the following language:

> The petition of the respondent is specific in that it is alleged that the guilty plea was induced by the written promise and agreement of the Solicitor and the Chief of Police of the City of Greenville, that if he would plead guilty he would only serve ten years and possibly less. There is no proof of this fact in the record. The promise and agreement, a copy of which said agreement was attached to the respondent's petition, is to the contrary. The written promise made by the Solicitor and the Chief of Police is definite, clear, explicit and unambiguous. The only promise made in such letter was that if the respondent entered a plea of guilty to murder with a recommendation to mercy that these officers would 'after the said Ray Bailey has served for a period of not exceeding ten years, recommend to the Board of Pardons or Governor a pardon or parole.' It is stipulated that the Solicitor never conferred with the respondent and that the written promise and agreement was explained to him by his employed counsel.
>
> A study of the entire record in this case leads us to the conclusion that the respondent has failed to prove by a preponderance of the evidence that he was misled, deceived or over-reached in any way. There is nothing to show that the plea was induced by coercion, false promises or misrepresentations. The respondent's plea of guilty was freely, voluntarily and understandingly made after full consultation with his brother and his employed counsel. The record is entirely free of any evidence that the plea of guilty entered by the respondent was induced or in any way influenced by any improper act or advice of his counsel but was entered after full disclosure to him by his counsel of its nature and possible consequences. There is a total absence of any proof that any one connected with the State, or even the respondent's own counsel, did or said anything which destroyed the voluntary character of his plea of guilty.

It is our conclusion, under all the facts and circumstances as revealed by the record in this case, that the respondent was not deprived of any rights guaranteed to him under the Constitution of the United States or of this State. We further conclude that the finding by the lower Court that respondent's plea of guilty was not voluntarily made is erroneous and should be set aside. 145 S. E. (2d) 432.

The United States District Court has the discretionary power to hold an evidentiary hearing on an application for *habeas corpus* challenging the validity of a state criminal conviction. *Fay v. Noia,* 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. (2d) 837. It is not required to hold an evidentiary hearing. A hearing is mandatory when (1) the merits of the factual dispute are not resolved in the State hearing, (2) the state factual determination is not fairly supported by the record as a whole, (3) the fact-finding procedure employed by the State Court was not adequate to afford a full and fair hearing, (4) there is a substantial allegation of newly discovered evidence (5) the material facts were not adequately developed at the State Court hearing, or (6) for any reason it appears that the state trier of fact did not afford the *habeas corpus* applicant a full and fair hearing on the facts. *Townsend v. Sain,* 372 U. S. 293, 83 S. Ct. 745, 9 L. Ed. (2d) 770, 31 L. W. 4297. See annotation at 9 L. Ed. (2d) 1246.

An evidentiary hearing is one in which are tried issues of basic, primary or historical facts, but not mixed questions in fact and law, which require the application of a legal standard to the historical-fact determinations. 9 L. Ed. (2d) at 1247. The United States District Court, on a state prisoner's application for *habeas corpus,* can dismiss the application without a hearing where the entire record is before the Court.

In the instant case a plenary hearing is not required. Justice would not be served by ordering a full hearing or by awarding any or all of the relief sought by the petitioner. The State Court records show that the petitioner was not denied due process of law. The record was fully developed and explored at state level.

The facts of the record are not in dispute and show no deprivation of constitutional rights. Applying each of the criteria to the instant case, the petitioner is not entitled to a hearing. The State Courts have given opinions, conclusions of law, and finding of fact, and have applied the proper standard of federal law setting forth the constitutional rights of the petitioner. The records show application by the State Courts of the correct constitutional standards. The record shows that the petitioner has received full and fair hearings on the testimony concerning all the allegations raised in the present petition.

With reference to criteria one (1), as set out in *Townsend v. Sain, supra,* paragraph 16, the United States District Court is not required to hold a hearing because the record discloses the findings of fact and the application of the correct constitutional standards. No combination of facts alleged would prove a violation of constitutional rights and the issues of law are not difficult or novel. Under criteria two (2), the record shows a factual determination. With regard to criteria three (3), there were no serious procedural errors and the trial was adequate to ascertain the truth. Concerning criteria four (4), there is no newly discovered evidence. Under criteria five (5), the petitioner developed all crucial evidence concerning constitutional rights at his trial, and under criteria six (6), the record shows relevant facts.

The record shows the evidence taken at the original trial, the findings of fact and the legal standards applied. The petitioner has been afforded the one full hearing to which he is entitled and the matter is concluded as to the taking of evidence at the discretion of the United States District Court.

The petition is discharged.

AND IT IS SO ORDERED.

ROBERT W. HEMPHILL,
United States District Judge.

Columbia, South Carolina
August 23, 1967.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,735

RAY S. BAILEY, APPELLANT,

versus

ELLIS C. MACDOUGALL, DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, *et al.*, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT COLUMBIA
HEMPHILL, DISTRICT JUDGE

(Argued December 4, 1967. Decided February 28, 1968)

Before BOREMAN, BRYAN AND BUTZNER, CIRCUIT JUDGES

Betty M. Sloan for Appellant, and Edward B. Latimer, Assistant Attorney General of South Carolina (Daniel R. McLeod, Attorney General of South Carolina, and B. O. Thomason, Jr., Solicitor, Thirteenth Judicial Circuit, on brief) for Appellees.

BUTZNER, Circuit Judge:

Ray S. Bailey was sentenced to life imprisonment in 1936 upon a plea of guilty to murder. Now Bailey challenges the validity of his plea, which was entered after the chief of police and the state's solicitor promised in writing they would recommend parole or pardon after Bailey had served a term not exceeding ten years. We hold that Bailey's arraignment was defective and the record fails to establish he understood the consequences of his plea. We remand the case for proceedings consistent with this opinion.

Bailey applied for a writ of *habeas corpus* in 1964 in the Court of Common Pleas for Richland County, South Carolina. After a full evidentiary hearing, the court found that Bailey's guilty plea was not voluntary, and ordered a new trial. Upon appeal the Supreme Court of South Carolina reversed and entered final judgment discharging the writ.[1] Bailey then applied to the United States District Court for a writ of *habeas corpus,* which was denied upon the basis of the state records without a plenary hearing.

A policeman, attempting to thwart a bank robbery, was killed in 1932 in Greenville, South Carolina. A few days later Bailey was charged with murder. Following an unsuccessful fight against extradition from North Carolina,[2] Bailey fled to Georgia. He was captured and returned to Greenville for trial. His brother, C. M. Bailey, and other members of his family retained a capable and experienced lawyer to defend him. He steadfastly maintained that he was not in Greenville the night of the murder, and upon his arraignment he pleaded not guilty.

The mainstay of the prosecution's case was a witness named Corea, who identified Bailey as the murderer of the policeman. Corea was sentenced to prison for robbery and refused to testify unless he was pardoned. The South Carolina solicitor who was prosecuting the case knew that another eyewitness was unable to identify Bailey positively. He also knew a number of witnesses would support Bailey's alibi. The solicitor suggested to Bailey's lawyer that Bailey plead guilty "with a recommendation to mercy."[3] This plea would result in a mandatory life sentence. Bailey's lawyer

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[1] *Bailey v. MacDougall,* 247 S. C. 1, 145 S. E. (2d) 425 (1965), cert. denied, 384 U. S. 962 (1966).

[2] Bailey was arrested in North Carolina on a warrant of extradition. On application for *habeas corpus,* a judge of the Superior Court of North Carolina held that South Carolina had failed to show probable cause for holding Bailey. The Supreme Court of North Carolina affirmed. *Ex parte Bailey,* 203 N. C. 362, 166 S. E. 165 (1932). The Supreme Court of the United States reversed, holding Bailey had the burden of showing beyond reasonable doubt that he was outside South Carolina. *South Carolina v. Bailey,* 289 U. S. 412 (1933).

[3] In South Carolina, a defendant can plead guilty to murder only before a jury, which, pursuant to the plea, returns a verdict of "guilty of murder with the recommendation to the mercy of the court."

did not know Corea refused to testify.[4] He thought the evidence would be sufficient to take the case to the jury and he knew that public sentiment was aroused over the killing. He said that he could advise his client to plead guilty to manslaughter, but the solicitor declined this offer. The lawyers finally agreed that if Bailey would enter a plea of guilty to murder with recommendation to mercy, the solicitor and the chief of police would recommend a pardon or parole after Bailey had served not more than ten years.

The defense attorney advised Bailey that if he did not participate in the shooting he should not plead guilty. The attorney explained that the plea arrangement meant a life sentence would be imposed, and that it did not mean the Governor would have to grant parole or pardon. He added that ordinarily the Governor would give great weight to the recommendation of the solicitor and the chief of police.[5] Bailey agreed to plead guilty. His attorney, out of an abundance of caution, required the solicitor and chief of police to put their promise in writing. They signed this statement:

> "This will confirm our conversation that in the event that Ray Bailey enters a plea of guilty with recommendation to mercy in the case now pending against him in the General Sessions Court for Greenville County that I will, knowing the facts of the case and the circumstances surrounding same, after the said Ray Bailey has served for a period not exceeding ten years, recommend to the Board of Pardons or Governor a pardon or parole."

Bailey withdrew his original plea and pleaded guilty with recommendation to mercy. He was sentenced to life imprisonment. No one mentioned the agreement. No inquiry was made to determine whether Bailey's plea was

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[4] Bailey urges, "Constitutional due process cannot be satisfied where the prosecution negotiates a guilty plea knowing it has no other means to obtain a conviction and fails to disclose this fact to either the defendant's counsel or the court." Bailey did not seek relief on this ground in the state court, and we do not consider it.

[5] When Bailey was arraigned, the Governor of South Carolina had absolute discretion to grant paroles and pardons. Ten years later, the Governor no longer exercised parole powers, although he could pardon. The Parole Board alone granted paroles.

voluntary or whether he understood the charges against him and the consequences of his plea. In the state *habeas* hearing the solicitor testified that he believed the trial judge was not aware of the agreement.

Bailey's lawyer placed the statement in his safety deposit box. At the expiration of the ten-year period, the solicitor, the chief of police, and Bailey's attorney unsuccessfully asked the Governor and the State Parole Board to pardon or parole Bailey.[6]

At the state *habeas corpus* hearing, Bailey testified that he was not in Greenville at the time the police officer was killed, and that at first he refused to plead guilty. He agreed to change his plea because he was certain any agreement the solicitor made would be carried out. He testified that there wasn't any doubt in his mind that he would be released in ten years.

Bailey was not alone in testifying he believed he would serve only ten years. The assistant solicitor, who investigated the case and was present at the arraignment, testified that "* * * when that plea was entered by that boy, at that time, I was convinced that, after service of these ten years, without doing something in the penitentiary to prevent it, he would have been released. I was convinced of it and I am sure that everybody in the courtroom that knew anything about it was."

Bailey raises several questions about plea bargaining. He does not urge the practice in itself is unconstitutional.[7]

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[6] After serving about 14 years Bailey escaped to North Carolina and surrendered. Later he escaped to Montana, where he was captured.

[7] Plea bargaining that induces an innocent person to plead guilty cannot be sanctioned. Negotiations must be limited to the quantum of punishment for an admittedly guilty defendant. *Cf. Tabor v. United States*, 203 F. (2d) 948 (4th Cir. 1953), cert. denied, 345 U. S. 1001 (1953); *Anderson v. North Carolina*, 221 F. Supp. 930 (W. D. N. C. 1963).

A comprehensive review of authorities criticizing or supporting plea bargaining is contained in *Commonwealth ex rel. Kerekes v. Maroney*, 423 Pa. 337, 223 A. (2d) 699 (1966). The practice, when restricted by prudent safeguards, is approved in Institute of Judicial Administration, ABA, Standards Relating to Pleas of Guilty, Part III (tentative draft 1967); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. Pa. L. Rev. 865 (1964). The practice is criticized in Curlee, *Criminal Law and Procedure*, 1966-67 *Survey of South Carolina Law*, 19 S. C. L. Rev. 30, 34 (1967).

He does claim the promise rendered his plea involuntary and that his arraignment was constitutionally defective.

The state *habeas* judge found Bailey believed he would serve not more than ten years and that the agreement leading to his change of plea "vitiated the voluntary nature of the guilty plea." The Supreme Court of South Carolina concluded this judgment was erroneous.[8] The State Supreme Court emphasized that the promise was only to recommend parole or pardon and that it had been kept, that the written statement was unambiguous, and that Bailey's attorney had explained to him that the Governor might not follow the recommendation. It concluded that the evidence did not disclose that the plea was induced by coercion, false promises, or misrepresentation, and that Bailey's plea was voluntary.

In *Machibroda v. United States*, 368 U. S. 487, 493 (1962), the Court held:

> "A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack. See *Walker v. Johnston*, 312 U. S. 275; *Waley v. Johnston*, 316 U. S. 101; *Shelton v. United States*, 356 U. S. 26, reversing, 246 F. (2d) 571."

The voluntariness of Bailey's plea does not depend upon whether he was the victim of a false promise. The question remains: Did the promise, even if fulfilled,[9] induce the plea and deprive it of the character of a voluntary act? Whether Bailey's plea was voluntary raises issues of fact, upon which the state courts differed. The state appellate court's rejection of the state *habeas* court's findings ordinarily would require us to remand the case to the federal district court for an evidentiary hearing. *Townsend v. Sain*, 372 U. S. 293 (1963). However, we find a remand unnecessary because the case can be decided upon an alterna-

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[8] *Bailey v. MacDougall*, 247 S. C. 1, 145 S. E. (2d) 425 (1965), cert. denied, 384 U. S. 962 (1966).

[9] *Cf. Shelton v. United States*, 356 U. S. 26 (1958), reversing on confession of error, 246 F. (2d) 571 (5th Cir. 1957); *Edgerton v. North Carolina*, 315 F. (2d) 676 (4th Cir. 1963); *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 253 (S. D. N. Y. 1966) (dictum).

tive ground which, under the circumstances, does not require another evidentiary hearing.

Bailey contends he was denied due process of law because the court did not advise him of the consequences of his plea. In examining whether Bailey fully understood the consequences of his plea, we limit ourselves to the direct consequences—the length of the sentence to be served.[10] Whether Bailey understood the consequences of his plea depends upon whether he understood the plea agreement. He claims the agreement meant he would be imprisoned not more than ten years. The state says the agreement provided only that he would be recommended for parole or pardon at the end of ten years.

In *Kercheval v. United States*, 274 U. S. 220, 223 (1927), the Court said:

> "A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury, it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences."

No particular form or ritual is required, but it must appear that the defendant understood the consequences of his plea.[11] The evidence discloses, however, that no inquiry

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[10] "Courts have not considered it necessary to inform the defendant of possible collateral consequences when such consequences result from subsequent criminal convictions of the defendant or do not relate directly to the charge to which the defendant pleads guilty." Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. Pa. L. Rev. 865, 875 (1964).

[11] Fed. R. Crim. P. 11, as amended in 1966, requires the court to determine this even though the defendant is represented by counsel. Many states also impose such a duty. Others hold the requirement is satisfied where counsel sufficiently informs the accused. Note, *Criminal Procedure—Duty of the Trial Judge to Advise a Defendant of the Consequences of a Guilty Plea*, 19 S. C. L. Rev. 261 (1967), Annot. 97 A. L. R. (2d) 549 (1964).

We decline to follow *McGrady v. Cunningham*, 296 F. (2d) 600 (4th Cir. 1961), cert. denied, 369 U. S. 855 (1962). Now *Townsend v. Sain*, 372 U. S. 293 (1963), would require a plenary hearing upon the petitioner's allegations.

was made by anyone to determine Bailey's understanding of the consequences of his plea. The judge asked him no questions. Indeed, it appears from the record that the judge himself did not know the full consequences. Bailey's attorney did his best to explain it, but he testified at the *habeas corpus* hearing that he could not say that Bailey or his brother understood the proposition. Apparently the court and Bailey's attorney assumed that Bailey understood. Bailey challenges the validity of this assumption. He claims he thought the consequences would be not more than ten years' confinement in prison.

Ordinarily there is no great difficulty in ascertaining that the defendant understood the consequences of his plea even when the parties have engaged in plea bargaining. The bargain itself generally is laid before the court through the recommendation and motions of the prosecuting attorney.[13] The difficulty arises in Bailey's case because the promise made by the prosecuting officers was extrajudicial. It was never revealed in open court, although Bailey's attorney and the solicitor both recognized that it was indispensable to securing Bailey's plea and that it had an important bearing upon Bailey's punishment. Regardless of whether we accept the state's or Bailey's version of the plea arraignment, the uncontradicted evidence shows that no effort was made at Bailey's arraignment to determine which version he understood. The dispute about the plea agreement, which must be adjudicated thirty years after arraignment, demonstrates the fundamental unfairness and the lack of due process in placing upon a prisoner the burden of showing by a preponderance of the evidence the terms of an admittedly secret, extrajudicial proviso that could substantially affect the length of his sentence. A prisoner's liberty should not depend upon the astuteness of his attorney in demanding and preserving written memoranda of a plea agreement or upon the vagaries of human recollection decades after arraignment.

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[13] Institute of Judicial Administration, ABA, Standards Relating to Pleas of Guilty, § 1.5, p. 29 (tentative draft 1967) suggests the plea agreement should be disclosed to the court, and that the court should advise the defendant that recommendations of the prosecutor are not binding on the court.

The defect in Bailey's arraignment lies in the fact that no one—court or counsel—ascertained that Bailey understood the consequences of his plea. Nevertheless, if Bailey in fact understood, the error was harmless. *Gundlach v. United States*, 262 F. (2d) 72 (4th Cir. 1958), cert. denied, 360 U. S. 904 (1959). The state, however, has the burden of proving harmless error. Cf. *Munich v. United States*, 337 F. (2d) 356, 360 (9th Cir. 1964).

The result does not depend upon the prisoner's subjective testimony alone. The issue is one of fact, which must be resolved by an examination of "reasonable inferences to be drawn from all the facts and circumstances." [18] Ordinarily this issue could be decided only in a plenary hearing in the district court, but this rule is not inexorable. Cf. *Fields v. Peyton*, 375 F. (2d) 624 (4th Cir. 1967). Counsel for both Bailey and the respondent have assured us that all evidence that can be marshalled is contained in the record. We find the material facts for the determination of this issue to be uncontradicted.

Aside from Bailey, the only witnesses who knew about the agreement at the time it was made were the solicitor, the assistant solicitor, and Bailey's attorney. The solicitor never discussed the matter with Bailey and consequently could offer no testimony on this issue. The assistant solicitor testified that at the time of the arraignment he was convinced, barring misbehavior, Bailey would be released after ten years. Thus, he tends to corroborate Bailey. The only witness who actually discussed with Bailey the meaning of the agreement was Bailey's attorney. With regard to Bailey's claim, "I accepted a life sentence with the distinct understanding that I would be free in ten years," Bailey's attorney testified, "He may have understood it that way * * * even though I tried to explain to him the circumstances of it, not being a lawyer and not being familiar with legalities and things of that kind. It's possible that Mr. Bailey felt that that would happen." This evidence does not establish whether the state's version or Bailey's version of the plea agreement should be accepted. The evidence

[18] *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 253 (S. D. N. Y. 1966).

demonstrates, however, that the state has not carried its burden of proving harmless error by showing Bailey understood what the state claims to be the consequences of his plea.

Under familiar principles of due process, a guilty plea cannot be accepted unless the defendant understands its consequences. At the arraignment the court made no effort to ascertain what Bailey understood, either through its own efforts or through counsel, and the state has failed to show this error was harmless. The judgment of the district court is reversed and this case is remanded for the issuance of a writ of *habeas corpus*. Execution of the writ may be stayed for a reasonable time to permit the State of South Carolina to retry Bailey if it be so advised.

Reversed and remanded.

APPENDIX G

FOR THE FOURTH CIRCUIT

No. 11,735

RAY S. BAILEY, APPELLANT,

versus

ELLIS MACDOUGALL, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS FOR THE STATE OF SOUTH CAROLINA, ET AL., APPELLEE.

ORDER DENYING REHEARING EN BANC

Upon consideration of the petition filed by Ellis MacDougall, Director of the Department of Corrections for the State of South Carolina, the court finds no grounds warranting a rehearing *en banc*.

Wherefore, with the approval of all the judges of this court, it is ORDERED that the petition be, and it is hereby, denied.

FILED

April 29, 1968.

SAMUEL W. PHILLIPS,
Clerk.

HERBERT S. BOREMAN,
United States Circuit Judge.

ALBERT V. BRYAN,
United States Circuit Judge.

/s/ JOHN D. BUTZNER, JR.,
United States Judge.

A true copy,
Tested:

SAMUEL W. PHILLIPS,
Clerk, U. S. Court of Appeals
for the Fourth Circuit.

By: MARGARET L. DAVIS,
Chief Deputy Clerk.